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## DATES OF RELEVANT PROCEEDINGS IN LOWER COURTS

1. Complaint in Chancery, filed September 12, 1963, with exhibits.
2. Motion for Temporary Injunction, filed September 17, 1963.
3. Temporary Injunction Order, entered on September 19, 1963.
4. Amended Complaint in Chancery, filed September 25, 1963, with exhibits.
5. Motion for Temporary Injunction, filed October 17, 1963.
6. Order for Temporary Injunction, entered on December 13, 1963.
7. Answer of Shell Oil Company, filed December 19, 1963.
8. Answer of Harry H. Hulman, Director of the Department of Revenue, filed January 10, 1964.
9. Stipulation, filed January 19, 1966, with appendices.
10. Interrogatories, filed January 17, 1966.
11. Reply to interrogatories, filed November 15, 1966.
12. Additional Stipulation, filed January 18, 1968.
13. Amended Answer of Shell Oil Company, filed January 26, 1968.
14. Order setting cause for trial and granting leave to substitute Theodore A. Jones as a party-defendant, entered December 12, 1967.
15. Answer (of Harry L. Hulman, Director of the Department of Revenue) to Amended Complaint, filed February 10, 1968.
16. Order of Permanent Injunction, entered on February 14, 1968.

17. Report of Proceedings in the Circuit Court of Cook County, Illinois held on February 14, February 15, February 16 and February 19, 1968.

18. Opinion of Circuit Court of Cook County, Illinois, delivered on December 9, 1968 and ordered filed on December 23, 1968.

19. Final Decree of Circuit Court of Cook County, Illinois, entered on December 23, 1968.

20. Notice of Appeal to Illinois Supreme Court, filed January 13, 1969.

21. Opinion of the Supreme Court of the State of Illinois, filed April 1, 1971.

22. Petition for rehearing in Illinois Supreme Court, filed May 1, 1971.

23. Order entered October 4, 1971, denying petition for rehearing.

24. Notice, motion and order of Justice Daniel P. Ward filed October 15, 1971, staying the mandate until completion of appeal proceedings before the United States Supreme Court.

25. Notice of Appeal to the Supreme Court of the United States, filed December 20, 1971.

*[038] Filed Sept. 25, 1963

STATE OF ILLINOIS
COUNTY OF COOK } ss.

IN THE CIRCUIT COURT OF COOK COUNTY

UNITED AIR LINES, INC.
Plaintiff,

v.

HARRY L. HULMAN, Director of Revenue of the Department of Revenue of the State of Illinois, WILLIAM G. CLARK, Attorney General of the State of Illinois, WILLIAM J. SCOTT, Treasurer of the State of Illinois, and SHELL OIL CO., a Delaware corporation,
Defendants.

63 C 17049

This Amended Complaint is filed pursuant to and in accordance with the order entered by Judge William V. Brothers on September 19, 1963.

## AMENDED COMPLAINT IN CHANCERY

UNITED AIR LINES, INC., plaintiff, for and on behalf of itself and all others similarly situated, by its attorneys and attorneys for all other members of the class of taxpayers to which plaintiff belongs, complains against HARRY L. HULMAN, Director of Revenue of the Department of Revenue of the State of Illinois, WILLIAM G. CLARK, Attorney General of the State of Illinois, WILLIAM J. SCOTT, Treasurer of the State of Illinois, and SHELL OIL CO., a Delaware corporation, defendants, and alleges as follows:

* Numbers in brackets [ ] throughout Appendix indicate page references to official record.

[039] 1. Plaintiff is a corporation subsisting under the laws of the State of Delaware, with its principal place of business located at 1200 Algonquin Road, Elk Grove Township, Cook County, Illinois, and is qualified to do business in Illinois.

2. Defendant Harry L. Hulman is the duly appointed, qualified and acting Director of Revenue of the Department of Revenue of the State of Illinois, and in that capacity is charged with administering and enforcing the revenue acts of the State of Illinois including the Use Tax Act, Ill. Rev. Stat. 1961, ch. 120, §§ 439.1 *et seq.*

3. Defendant William G. Clark is the duly elected, qualified and acting Attorney General of the State of Illinois, and in that capacity is charged with the duty of representing defendant Harry L. Hulman, as Director of Revenue, in all legal proceedings involving the administration, enforcement and collection of the Illinois use tax.

4. Defendant William J. Scott is the duly elected, qualified and acting Treasurer of the State of Illinois, and in that capacity is the legal custodian of funds in the State Treasury resulting from and created by the collection of Illinois use tax.

4A. Shell Oil Co. is a corporation subsisting under the laws of the State of Delaware, with its principal place of business located at 50 West 50th Street, New York City, New York, and is qualified to do business in the State of Illinois.

[040] 5. The class to which plaintiff belongs, and on behalf of which it has instituted this action, is described in paragraph 27.

6. Plaintiff brings this action under the general chancery jurisdiction of this Court to enjoin imposition of illegal, unauthorized and invalid tax based on the authority

of *Owens-Illinois Glass Co.* v. *McKibbin*, 385 Ill. 245, 256 (1944), in which the Illinois Supreme Court stated as follows:

> "From the foregoing resumé the enjoining of the collection of illegal taxes constitutes an exception to the general rule that equity will not take jurisdiction of a cause when there is an adequate remedy at law. It is established that where a tax is unauthorized by law, or where it is levied upon property exempt from taxation, equity will take jursdiction and enjoin the collection of the tax. This constitutes an independent ground of equitable relief, and in such cases it is not necessary that special circumstances exist to authorize issuing an injunction. It is also the rule in such cases that where remedies are provided by statute they are cumulative, and are exclusive only where they have been first invoked by the taxpayer. And it is to be noted this exception to the general rule applies only to the illegal and unauthorized imposition of a tax, and not to irregularities in levying a lawful tax."

See also *Johnson* v. *Halpin*, 413 Ill. 257 (1952).

7. To the extent that payments of the use tax may be made under protest by plaintiff or other members of the class to which plaintiff belongs, this action is also brought pursuant to Sections 2a and 2a.1 of the Act of June 9, 1911, as amended (known sometimes as the Public Moneys Act or as the Protest Fund Act), Ill. Rev. Stat. 1961, ch. 127, §§ 172, 172(a).

8. Plaintiff is, and continually since January 1, 1960 (the period to which this complaint pertains) has been, the [041] holder of certificates of public convenience and necessity issued to it by the United States Civil Aeronautics Board under the provisions of the Federal Aviation Act of 1958, as amended, 49 U.S.C. §§ 1301 *et seq.*, authorizing it to engage in the transportation of persons, property and United States mail by air on regularly scheduled

flights between designated terminal and intermediate points on routes described in such certificates. A map of plaintiff's certified routes is attached hereto and incorporated herein as Exhibit A. Plaintiff thereby also is authorized to operate charter flights without regard to the points named in such certificates.

9. Pursuant to these certificates of public convenience and necessity plaintiff performs, and during all or a portion of the period since January 1, 1960, has performed, common carriage by aircraft of persons, property and United States mail on scheduled flights between points within the State of Illinois, on one hand, and points within the States of Massachusetts, Connecticut, Rhode Island, New York, Maryland, Virginia, Pennsylvania, Ohio, Michigan, Indiana, Wisconsin, Minnesota, Iowa, Nebraska, Missouri, Colorado, Utah, Nevada, Idaho, Washington, Oregon, California, Hawaii and the District of Columbia on the other hand. During this period plaintiff has also performed common carriage by air of persons and property on charter flights between points within the State of Illinois and points outside the State of Illinois, including flights to Canada.

[042] 10. The points within the State of Illinois from and to which plaintiff presently operates aircraft are O'Hare International Airport, Chicago, and Quad-Cities Airport, Moline. For a period after January 1, 1960, plaintiff also operated aircraft from and to Midway Airport, Chicago.

11. All flights to and from Chicago are, and since January 1, 1960, have been, from or to points outside Illinois, except for limited scheduled service between Chicago and Moline and some intrastate charter flights.

12. In excess of 99.5% of all flights of plaintiff's aircraft departing pursuant to plaintiff's certificates of public convenience and necessity since January 1, 1960, from Midway

and O'Hare Airports have been according to published schedules filed with the United States Post Office Department and the Civil Aeronautics Board. Most of the remaining ½ of 1% have been charter flights. There has also been a *de minimis* amount of training, testing, ferry, and non-revenue flights for purposes of positioning aircraft, which are not flights pursuant to plaintiff's certificates of public convenience and necessity.

13. At present, and since January 1, 1960, most, if not virtually all, plaintiff's flights departing from O'Hare and Midway Airports take and have taken on fuel, either as aviation gasoline for piston engine aircraft or kerosene for turbine aircraft.

14. All such fuel loaded aboard plaintiff's flights departing from Chicago is, and since January 1, 1960, has [043] been, purchased by and delivered to plaintiff outside Illinois, specifically at East Chicago and Hammond, Indiana, pursuant to contracts negotiated and executed outside Illinois.

14A. The seller of all such fuel is, and during the applicable period was, Shell Oil Co. Shell Oil Co. does not, and during the applicable period has not collected Illinois use tax from plaintiff, a practice established in 1955 and continued uninterrupted since then with the repeated approval of authorized representatives of the Director of Revenue and his predecessors in office.

15. After purchasing the fuel and receiving delivery of it outside Illinois, plaintiff causes, and since January 1, 1960, continuously has caused, such fuel to be transported by truck or pipeline to storage facilities near and on O'Hare and Midway Airports.

16. As operations require, the fuel is, and since January 1, 1960, has been, withdrawn from the storage facilities at

Midway and O'Hare Airports for loading aboard plaintiff's flights departing from such airports. Such fueling is customarily done immediately prior to departure.

17. The actual course that all plaintiff's flights take, or have taken since January 1, 1960, is and has been governed by the Federal Aviation Agency, established by the Federal Aviation Act of 1958, *supra*. Such actual courses are determined by "departure routes" which govern the climb portion of a flight, and "airways" which govern the cruise portion. The same departure routes and airways customarily [044] are assigned to plaintiff for particular flights, although there may be and are certain variations on a given day from either such typical departure routes or airways depending on weather and other operating conditions. Despite these day-to-day variations, plaintiff's flights departing from O'Hare are being, and flights which have departed from O'Hare and Midway Airports since January 1, 1960, have been, flown on what can be accurately described as "typical" departure routes and airways. Although such departure routes and airways have varied from time to time and according to the type of aircraft being flown, at present for eastbound flights there are three principal ones, for northbound two, and for westbound four.

18. Pursuant to regulations of the Federal Aviation Agency, all aircraft operated by plaintiff are, and since January 1, 1960, have been required to maintain a "reserve fuel supply," above and beyond that required to transport a plane to its scheduled destination. Such reserve fuel requirements have varied from time to time, and vary according to the type of aircraft involved and with anticipated weather conditions. A current example is that the reserve fuel requirement for a Boeing 720 or a Douglas DC-8 four-engined jet is 8,000 pounds of fuel, plus, if weather conditions require the specification of an alternate

destination on the flight plan, such additional fuel as is required to take the plane from its scheduled destination to the specified alternate point for such flight. Typical alternate points for jet aircraft destined for Chicago include [045] Minneapolis, Omaha, Milwaukee, Detroit and Cleveland.

19. Plaintiff has established, in the conduct of its flight operation, reserve fuel requirements which are, and since January 1, 1960, continuously have been, in excess of those of the Federal Aviation Agency. For example, plaintiff's current reserve requirement for Boeing 720 and Douglas DC-8 aircraft is a minimum of 12,000 pounds, plus, if weather conditions require the specification of an alternate destination on the flight plan, the greater of 3,000 additional pounds of fuel or such additional fuel as is required to take the plane from its scheduled destination to the specified alternate point for such flight.

20. Because of the reserve fuel supply required by the Federal Aviation Agency, as supplemented by plaintiff's operating regulations, plaintiff's aircraft landing at Midway and O'Hare Airports almost always have a considerable amount of fuel aboard. Engineering fuel consumption data, confirmed by actual spot testing of individual flights, show that virtually all, if not all, of plaintiff's planes which have arrived at Midway or O'Hare Airports since January 1, 1960 have had sufficient fuel aboard when they landed to take them, without additional fuel, outside Illinois on the plane's actually succeeding flight on typical (as described in paragraph 17) eastbound or northbound airways, taking into account fuel consumed in taxing, run-up, take-off, climb and cruise. According to engineering fuel consumption data, confirmed by actual spot checks, a similar condition appears to have existed [046] on virtually all flights departing Illinois using typical westbound airways, with the exception of a small number of piston engine flights to

Kansas City. It follows, from a traditional and realistic first-in, first-out viewpoint of fuel consumption, that with *de minimis* exceptions, none of the fuel loaded aboard at O'Hare and Midway Airports by plaintiff since January 1, 1960, is or has been actually used or consumed within the borders of Illinois (excluding certain intrastate flights on which the applicable Illinois use tax has been and is being paid).

21. By a series of letter opinions issued in 1955 and thereafter, examples of which are set forth as Exhibits B and C attached hereto and incorporated herein, the Director of Revenue, and his predecessors in office, have taken the position that fuel purchased by interstate carriers outside Illinois, brought into and temporarily stored by them in Illinois, is subject to use tax only to the extent of the portion of such fuel actually used or consumed by being burned off within Illinois. Such ruling also relieved retailers of the fuel from the duty of collecting the use tax in such situations, and required the carrier to directly file a use tax return and pay the tax according to what was actually burned off by it within Illinois.

22. The interpretation set forth in the preceding paragraph was, upon information and belief, repeatedly reiterated since 1955 by auditors representing the Director of Revenue during the examination of the books and records of numerous carriers and by other representatives of the Director [047] of Revenue upon inquiry by interested persons. This interpretation in fact was a publicly known policy and practice of the Director of Revenue.

23. This interpretation of the Director of Revenue, and his predecessors, continuously in effect from 1955 until June of 1963, has, upon information and belief, been known and relied upon by numerous carriers and by numerous retailers of fuel.

24. This interpretation of the Director of Revenue, and his predecessors, has been known and relied upon by the plaintiff since 1955. Plaintiff accordingly has for all periods involved since that date to the present time filed Illinois use tax returns and paid use tax on fuel which it purchased outside Illinois, stored in Illinois and loaded in Illinois aboard aircraft in the conduct of its operations to the following extent:

(a) On all fuel consumed on flights originating within and terminating within Illinois (intrastate operations) and

(b) On a portion of the fuel deemed to have been used and consumed (burned off) in Illinois on flights departing from Midway and O'Hare to points outside Illinois. The computation of the use tax paid under this arrangement is and has been pursuant to a formula accepted by representatives of the Department of Revenue during several audits since 1955.

[048] 25. Acting within his authority as Director of Revenue of the Department of Revenue of Illinois, the defendant Theodore J. Isaacs, on June 3, 1963, issued an interpretation in the form of a Bulletin entitled, "Temporary Storage of Motor Fuel under Provisions of the Use Tax Act", a copy of which is attached hereto and incorporated herein as Exhibit D. This Bulletin provides in part that ". . . temporary storage ends and a taxable use occurs when the fuel is taken out of storage facilities and is placed into the tank of the airplane, railroad engine or truck. At this point the fuel is converted into its ultimate use, and, therefore, a taxable use occurs in Illinois."

26. By this interpretation, the Director of Revenue is asserting that temporary storage of fuel ends when such fuel is loaded in Illinois aboard air, land and water (although the latter are not specifically mentioned in the

Bulletin) craft or vehicles, and that therefore such fuel is subject to Illinois use tax, regardless of whether it:

(a) is used and consumed in the integral conduct of interstate and foreign commerce, or

(b) in whole or in part is used and consumed outside Illinois.

27. By this interpretation, the Director of Revenue is asserting that use tax due as aforesaid on all fuel loaded in Illinois aboard aircraft of the plaintiff and all other air carriers and upon the vehicles or craft of all railroads, truck lines, bus lines, barge lines and steamship companies [049] which operate in interstate or foreign commerce as common, contract or private carriers. Such carriers constitute a class, all of which have the same issues of law in fact, as does the plaintiff—to wit, the applicability of the Illinois use tax to fuel which, having been purchased outside Illinois and stored in Illinois by the carrier, is loaded by it in Illinois aboard craft and vehicles to be used and consumed in propelling such craft or vehicles in interstate and foreign commerce.

28. By this interpretation, the Director of Revenue applies the use tax to fuel in a manner different from all other types of tangible personal property, in that the act of preparing to transport some or all of the fuel outside the State is deemed to be a taxable use. No other interpretation by the Director of Revenue applies such a rule to any other types of tangible personal property.

29. By this interpretation, the Director of Revenue distinguishes, for purposes of applying the use tax, the type of container in which fuel is stored, in that fuel stored in the tank of a craft or vehicle is not considered temporary storage in contrast to storage in any other form of container or facility. No other interpretation by the Director

of Revenue applies such a rule to the storage of any other type of tangible personal property.

30. The interpretation of the Director of Revenue set forth in the Bulletin dated June 3, 1963, is contrary to the intention of the General Assembly and the express language [050] of the Use Tax Act in the following respects:

(a) it is contrary to Section 3 of the Use Tax Act, Ill. Rev. Stat. 1961, ch. 120, § 439.3, which imposes the tax ". . . upon the privilege of using *in* this State tangible personal property . . . [emphasis supplied]";

(b) it is contrary to the plain meaning and intended scope of the definition of "use" set forth in Section 2 of the Act, *id.* § 439.2;

(c) it is contrary to the plain meaning and intention of the "temporary storage" exemption set forth in Section 3 of the Act, *id.* § 439.3.

31. The allegations set forth in the preceding paragraph are confirmed by the following rules of statutory construction uniformly followed by the Courts of this State:

(a) the interpretation of the Director of Revenue would, as alleged in paragraphs 28 and 29, apply the use tax on fuel in a way different from the application of such tax to all other types of tangible personal property, thus infringing upon the rule of uniform and consistent construction of tax acts;

(b) the interpretation of the Director of Revenue would be contrary to the common and ordinary meaning of the words "use" and "temporary storage". See *Revzan* v. *Nudelman*, 370 Ill. 180, 184-5 (1938);

(c) the interpretation of the Director of [051] Revenue would be contrary to his long-continued interpretation and application of the Use Tax Act relating to fuel loaded in Illinois aboard craft and vehicles engaged in interstate and foreign commerce, which interpretation and application can be deemed to have been

approved by the General Assembly because of its failure to amend or clarify the relevant statutory language, particularly, when it repeatedly amended since 1955 Sections 2 and 3 of the Act. See *e.g. People* v. *Lyons*, 1 Ill.2d 409, 414 (1953) and

(d) the interpretation of the Director of Revenue would violate the established rule, as stated in *Ingersoll Milling Machine Co.* v. *Department of Revenue*, 405 Ill. 367, 373 (1950):

> "Taxing statutes are to be strictly construed and their language is not to be extended or enlarged by implication beyond its clear import, but in cases of doubt such laws are construed most strongly against the government and in favor of the taxpayer."

32. The interpretation of the Department of Revenue is contrary to the Constitution of Illinois in the following respects:

(a) the application of the use tax to fuel in a manner different from all other types of tangible personal property, as more fully set out in paragraph 28, constitutes an unreasonable classification in violation of the Revenue [052] Article, Article IX, § 1;

(b) the application of the use tax according to the type of container in which the fuel is stored, as set forth in paragraph 29, constitutes an unreasonable classification in violation of the Revenue Article, Article IX, § 1, in that (i) it applies the temporary storage exemption to fuel in a way different from all other types of tangible personal property, and (ii) further, it discriminates against air and water carriers which are less able than land carriers to transport fuel in tanks unconnected with the motive power of the craft or vehicle;

(c) the application of the use tax as set forth in subparagraph (a) above violates the Due Process Section, Article II, § 2;

(d) the application of the use tax as set forth in subparagraph (b) above violates the Due Process Section, Article II, § 2;

(e) the application of the use tax to all fuel loaded aboard craft or vehicles in Illinois, even though such fuel actually is used and consumed outside Illinois violates Article IV, § 13, in that such application of the tax would not conform to the title of the Use Tax Act which is "An Act in relation to a tax upon the privilege of using tangible personal property *in* this State [emphasis [053] supplied]". Ill. Laws 1955, p. 2027, as amended, Ill. Laws 1959, p. 654, § 2.

33. If the interpretation of the Director of Revenue is construed to impose the use tax on either (i) the loading in Illinois of fuel aboard aircraft or vehicles about to commence journeys in interstate or foreign commerce or (ii) upon the use or consumption of the fuel in the interstate or foreign journey, such interpretation would violate the Commerce Clause, Article I, § 8, cl. 3, of the United States Constitution, in that it would directly burden and would tend to create multiple burdens on interstate commerce.

34. If the interpretation of the Director of Revenue is construed to impose the use tax on either (i) the loading in Illinois of fuel aboard craft or vehicles about to commence journeys in foreign commerce, or (ii) upon the use or consumption of the fuel in foreign commerce, such interpretation would violate the Import-Export Clause, Article I, § 10, cl. 2, of the United States Constitution.

35. If the interpretation of the Director of Revenue is construed to impose the use tax according to the distinctions more fully outlined in paragraphs 28 and 29, such imposition would, as an unreasonable and arbitrary classification, violate the Due Process and Equal Protection Clauses of the United States Constitution.

36. The Director of Revenue seeks to enforce the Bulletin retroactively as well as prospectively. Such retroactive interpretation, which would reverse the long [054] continued publicly announced practice and letter rulings of the Department of Revenue, which interpretation can be deemed to have been approved by the State Legislature, would violate the Due Process and *ex post facto* law provisions, respectively Article II, § 2 and § 14 of the Illinois Constitution, as well as the principle against retroactive application of a changed administrative interpretation established by the Supreme Court in *Pressed Steel Car Co.* v. *Lyons*, 7 Ill. 2d 96, 105-6 (1955).

37. The retroactive application of the Bulletin of the Director of Revenue, as outlined in the preceding paragraph, also would violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

38. Plaintiff and all other members of the class to which it belongs are without an adequate remedy at law, because unless each of them complies with the regulation herein complained of, and pays an Illinois use tax on all fuel loaded aboard craft or vehicles in this State, they will severally be subjected to numerous actions instituted against them by the Department of Revenue through the Attorney General of Illinois. Moreover, those members of the class who do not directly file use tax returns and remit the use tax, but who have it collected from them by the retailer selling such fuel to them outside Illinois similarly have no adequate remedy at law.

WHEREFORE, plaintiff prays of this Court for and on behalf of itself and all other members of the class above described as follows:

[055] I. To grant forthwith a temporary writ of injunction directed to defendant Harry L. Hulman as Director of Revenue of the Department of Revenue of

the State of Illinois, his representatives and successors in office, and William G. Clark, his representatives and successors in office, enjoining each of them, until further order of this Court, from in any way, directly or indirectly, imposing, assessing (including making any final denial of a claim for credit or refund pursuant to an administrative proceeding instituted, as required by Section 2a of the Act of June 9, 1911, as amended, Ill. Rev. Stat. 1961, ch. 127, § 172, by a member of the class to which plaintiff belongs who paid the use tax under protest on the use of fuel within the scope of this litigation) or collecting or attempting to impose, assess or collect a use tax upon all fuel which, after being purchased outside Illinois and stored in Illinois by a common, contract, or private carrier by air, land, or water, is loaded in Illinois by such carrier aboard craft or vehicles to be used and consumed in propelling such craft or vehicles in interstate or foreign commerce, irrespective of whether such fuel actually is burned off within or outside the borders of Illinois;

II. To grant forthwith a temporary writ of [056] injunction directed to defendant Harry L. Hulman, as Director of Revenue of the Department of Revenue of the State of Illinois, his representatives and successors in office, enjoining each of them, until further order of this Court from turning over to the Treasurer of Illinois any moneys paid to defendant Hulman under protest as use tax by or on behalf of the plaintiff or any other member of the class (including payment under protest of use tax by a retailer who collected such tax from any member of the class) for fuel which, after being purchased outside Illinois and stored in Illinois, is loaded in Illinois by such carrier aboard craft or vehicles to be used and consumed in propelling such craft or vehicles in interstate or foreign commerce, except with notice to the Treasurer of Illinois that such moneys are to be segregated by the Treasurer of Illinois and placed by him in a Protest Fund pursuant to Sections 2a and 2a.1 of the Act of June 9, 1911, as amended, Ill. Rev. Stat. 1961, ch. 127, §§ 172, 172(a);

III. To grant forthwith a temporary writ of injunction directed to defendant William J. Scott, Treasurer of Illinois, his representatives and successors in office, enjoining each of them until further order of this Court, from placing any such moneys into the General Revenue Fund or in any fund other than a Protest Fund maintained by such defendant [057] for the purposes of this litigation;

IV. That in order to avoid a multiplicity of similar suits by members of the class to which the plaintiff belongs and for which the plaintiff is prosecuting this action, to forthwith grant a temporary writ of injunction against all other members of the class, as defined in paragraph 27, from litigating by any procedure before the Courts of this State against the State officers made defendants herein the substantive issues raised in this proceeding and diligently prosecuted by the plaintiff herein, provided that no person within this class (i) is prohibited from paying the use tax under protest and filing a complaint in chancery for a temporary injunction and a claim for refund or credit with the Director of Revenue pursuant to Section 2a of the Act of June 9, 1911, as amended, Ill. Rev. Stat., 1961, ch. 127, § 172, or (ii) from joining or intervening in this proceeding;

V. That, after full and complete hearing, to finally determine that the use tax sought be imposed, assessed and collected on fuel loaded in Illinois by common, contract or private carriers by air, land or water aboard craft vehicles to be used or consumed in propelling such craft or vehicles in interstate or foreign commerce is contrary to [058] the Use Tax Act and the Illinois Constitution, and/or the Federal Constitution as herein alleged;

VI. That after full and complete hearing to make permanent the temporary injunction orders set forth as I, II, and III;

VII. That, after full and complete hearing, resulting in a final determination in favor of the plaintiff and other members of the class pursuant to V. above,

to issue a writ of injunction to the defendant William J. Scott, as Treasurer of Illinois, ordering him to distribute such portion of the Protest Fund deemed to have been collected contrary to law to the plaintiff and other members of the class which are entitled to such refund in accordance with such conditions as the Court shall deem just and equitable;

VIII. To grant to the plaintiff and all other members of the class such other further relief as may be just and equitable to do complete and substantial justice.

UNITED AIR LINES, INC.
Plaintiff

By .....
H. Templeton Brown
231 S. LaSalle Street
Chicago 4, Illinois

By .....
Mark H. Berens
231 S. LaSalle Street
Chicago 4, Illinois

MAYER, FRIEDLICH, SPIESS,
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231 South LaSalle Street
Chicago 4, Illinois
STate 2-0600

Of Counsel

[059] STATE OF ILLINOIS
COUNTY OF COOK } ss.

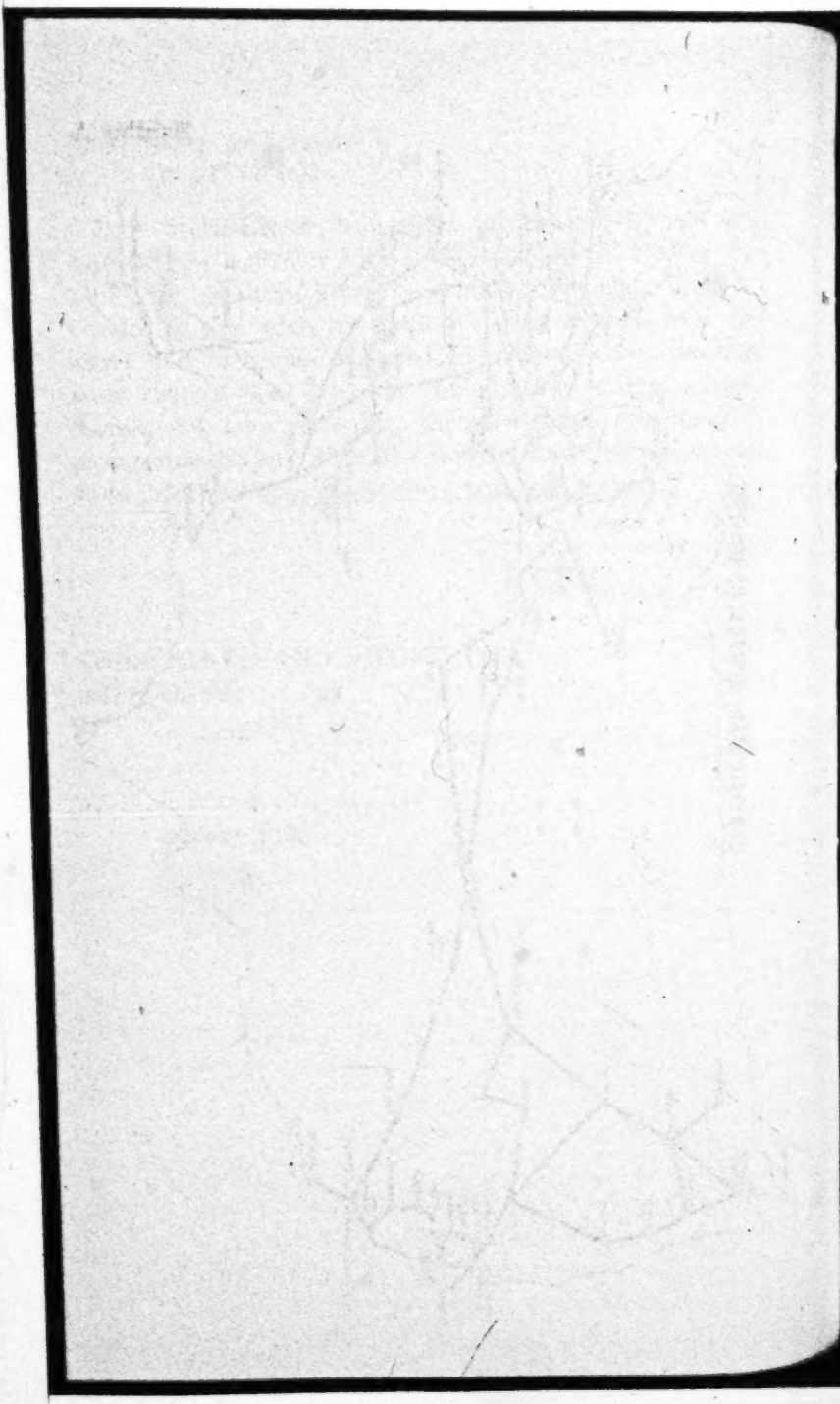
C. F. McERLEAN, being first duly sworn, deposes and says that he is Senior Vice President - Law of United Air Lines, Inc., plaintiff herein, and makes this affidavit on its behalf, by and with its authority, that he has read the above and foregoing amended complaint, knows the contents thereof, and that the matters and things alleged therein are true, excepting the allegations contained in paragraphs 22 and 23 of the complaint, which allegations he is informed and believes are true and correct.

.....
C. F. McErlean

SUBSCRIBED AND SWORN TO
before me this ... day
of ....., 1963.

.....
Notary Public

Exhibit A



[061] **Exhibit B**

Richard J. Lyons
Director
Andrew Fasscao
Assistant Director

Rules and Regulations
Division

STATE OF ILLINOIS
William G. Stratton, Governor
DEPARTMENT OF REVENUE
Springfield
July 12, 1955

Honorable Paul J. Randolph
155 North Wacker Drive
Chicago 6, Illinois

Dear Representative Randolph:

This is with reference to your telephone call of yesterday.

If and when the Governor signs Senate Bill No. 510 (the Use Tax Act), we intend to interpret examption (b), in the part of Section 3 of the law dealing with exemptions that are allowed to prevent multi-state taxation, as meaning the transportation vehicles of any kind of interstate company (railroad, bus line, air line, trucking company, etc.). We think that this broad sense is the way in which the General Assembly intended "rolling stock" in this situation to be interpreted since the reason for the exemption (to prevent taxation by more than one state) applies as much to the rolling stock or transportation vehicles of one kind of interstate carrier as to those of another, where such transportation vehicles or rolling stock move in interstate commerce so as to be used in more than one state. Any other interpretation restricting "rolling stock" to the transportation vehicles of a railroad or some other one kind of interstate carrier would be discriminatory and, in our opinion, would not carry out the Legislature's intention in

adopting this exemption provision, and we believe the provision should be given a construction which makes it nondiscriminatory in effect when the provision is reasonably capable of such a construction. There is nothing in the provision which restricts its application to any particular kind of carrier except for "rolling stock" to be given its narrowest and most literal meaning, and we do not believe that this should be done when the result would obviously defeat the Legislature's purpose by causing discrimination. Equipment (not transportation vehicles), gasoline and other supplies would not qualify as "rolling stock" under any reasonable interpretation of that phrase and so would not come within the exemption provision under discussion. If such items which are not within the exemption are purchased outside Illinois by a carrier, and some of the items or units thereof (such as so many gallons of gasoline) are used in Illinois and some of the items or units thereof (such as so many gallons of gasoline) are used outside Illinois, the carrier would be liable for the use tax on the items used in Illinois, but not on the items used outside Illinois assuming that the carrier keeps adequate records to aggregate the nontaxable from the taxable items.

It should be pointed out that if a seller, when selling tangible personal property to the carrier for use, delivers the property from a point in Illinois to the purchasing carrier at a point in Illinois, the seller incurs retailers' occupation tax liability regardless of where the property may be used by the purchaser. This is just as true of rolling stock (transportation vehicles) as it is of gasoline and other kinds of tangible personal property. Please refer to paragraph 1 of subdivision II of Article 5 of the retailers' occupation tax Rules and Regulations, a copy of which is enclosed. Nothing in the Use Tax Act changes the Retailers' Occupation Tax Act.

Very truly yours,
Willard Ice

[062] Exhibit C

August 26, 1955

Re: Your File 11-0—Illinois Use Tax

Phillips Petroleum Company
Bartlesville
Oklahoma

ATTENTION: Mr. F. H. Chichester, Director—Excise Tax

Gentlemen:

Your letters of August 2 and 19, 1955, addressed to the Retailers' Occupation Tax Division, have been referred to this office for reply.

Since you are a "retailer maintaining a place of business in this State", you would be required to collect the use tax when shipping gasoline from a point outside Illinois to a purchaser like American Airlines in Illinois for use. In general, you cannot be relieved of your responsibility for collecting the use tax simply because the purchaser wishes to assume responsibility for paying the use tax directly to this Department. However, if the retailers' occupation tax does not apply to the transaction so that the only tax involved is the use tax, there is an exemption provision in the Use Tax Act for tangible personal property that is acquired outside Illinois and stored here temporarily, but then used exclusively outside Illinois. Where the purchaser is the kind that could use the tangible personal property in more than one state (such as an interstate airline or an interstate railroad) and the property is the kind that could be used in more than one state (such as fuel), and where such purchaser acquires the property from you outside Illinois under such circumstances that no tax but the use tax could be involved in the transaction, you will be relieved from collecting the use tax from the purchaser if the pur-

chaser certifies to you that the tangible personal property covered by the purchase order is to be stored temporarily in Illinois and then used outside Illinois. If the purchaser thereafter should happen to change its intention in this respect and use some of such tangible personal property in Illinois, the purchaser will be expected to pay the use tax thereon directly to this Department. In the type of case just described, you should retain the exemption certificate in question from the purchaser among your books and records in case of an audit by the Department.

Very truly yours,

Richard J. Lyons,
Director of Revenue

By:
Willard Ice, Supervisor
Rules and Regulations Division

WI:mh
cc. American Airlines

[063] **Exhibit D**

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
Springfield

Theodore J. Isaacs
Director
Albert R. Imle
Assistant Director

BULLETIN

RE: Temporary Storage of Motor Fuel Under Provisions of the Use Tax Act

The purpose of this bulletin is to clarify the Department's position concerning the temporary storage provisions of the Use Tax Act and their relationship to fuel consumed by a common carrier.

The Department's position is that temporary storage ends and a taxable use occurs when the fuel is taken out of storage facilities and is placed into the tank of the airplane, railroad engine or truck. At this point, the fuel is converted into its ultimate use, and, therefore, a taxable use occurs in Illinois.

If a common carrier does not have separate facilities for transferring the fuel out of the State of Illinois but always puts it into the tank of the airplane, railroad engine or truck for final consumption, then they no longer will be able to give a certificate to the vendor stating that the fuel is purchased within the temporary storage provisions of the Use Tax Act, but must pay the use tax to their supplier.

THEODORE J. ISAACS
Theodore J. Isaacs
Director of Revenue

Issued: June 3, 1963

[065] STATE OF ILLINOIS } ss.
COUNTY OF COOK }

IN THE CIRCUIT COURT OF COOK COUNTY

UNITED AIR LINES, INC.
Plaintiff,

v.

HARRY L. HULMAN, Director of Revenue of the Department of Revenue of the State of Illinois, WILLIAM G. CLARK, Attorney General of the State of Illinois, WILLIAM J. SCOTT, Treasurer of the State of Illinois, and SHELL OIL CO., a Delaware corporation,
Defendants.

63 C 17049

## MOTION FOR TEMPORARY INJUNCTION

Now comes United Air Lines, Inc., plaintiff, by its attorneys, and moves this Court to enter an order for temporary injunction in accordance with paragraph I of the Prayer of plaintiff's Amended Complaint in Chancery, said temporary injunction to be limited, however, to the following terms:

> That defendant Theodore J. Isaacs, as Director of Revenue of the Department of Revenue of the State of Illinois, his representatives and successors in office, be, and they and each of them are hereby restrained, until further order of this Court, from in any way, directly or indirectly, imposing, assessing (including making any determination, [066] final or otherwise, of a claim for credit or refund pertaining to the use of fuel within the scope of this litigation and filed by plaintiff either (i) to recover use tax paid by plaintiff under protest or (ii) for use tax paid by plaintiff not under protest) or collecting or attempting to impose, assess or collect a use tax upon any fuel which, after being purchased by plaintiff outside Illinois and stored

in Illinois, is loaded by plaintiff in Illinois aboard aircraft to be used and consumed in propelling said aircraft in interstate or foreign commerce, irrespective of whether such fuel actually is burned off within or outside the borders of Illinois.

UNITED AIR LINES, INC.
Plaintiff

By MARK H. BERENS
Mark H. Berens

WM. BRUCE HOFF, JR.
Wm. Bruce Hoff, Jr.
Its Attorneys

Of Counsel:

MAYER, FRIEDLICH, SPIESS,
TIERNEY, BROWN & PLATT
231 South LaSalle Street
Chicago 4, Illinois
STate 2-0600

[068] [Caption Omitted]

**ORDER FOR TEMPORARY INJUNCTION**

This cause coming on to be heard on the motion of United Air Lines, Inc., plaintiff, by its attorneys, for a temporary injunction under the general Chancery jurisdiction of this Court,

IT IS ORDERED that defendant Theodore J. Isaacs, as Director of Revenue of the Department of Revenue of the State of Illinois, his representatives and successors in office, be, and they and each of them are hereby restrained, until further order of this Court, from in any way, directly or indirectly, imposing, assessing (including making any determination, final or otherwise, of a claim for credit or refund pertaining to the use of fuel within the scope of this litiga-

tion and filed by plaintiff either (i) to recover use tax paid by plaintiff under protest or (ii) for use tax paid by plaintiff not under protest) or collecting or attempting to impose, assess or collect a use tax upon any fuel which, after being [069] purchased by plaintiff outside Illinois and stored in Illinois, was loaded prior to June 3, 1963, by plaintiff in Illinois, aboard aircraft to be used and consumed in propelling said aircraft in interstate or foreign commerce, irrespective of whether such fuel actually was burned off within or outside the borders of Illinois.

IT IS FURTHER ORDERED that the manner and extent to which plaintiff shall furnish indemnification covering said temporary injunction shall be determined and agreed upon between the attorneys for plaintiff and the attorneys for defendant.

IT IS FURTHER ORDERED that plaintiff's motion for an injunction under the general Chancery jurisdiction of this Court is denied as to the period between June 3, 1963 and August 1, 1963.

IT IS FURTHER ORDERED that plaintiff's motion for an injunction under the general Chancery jurisdiction of this Court is denied as to all periods subsequent to August 1, 1963.

DATED: December 13th, 1963.

William V. Brothers
Judge

[071] [Caption Omitted]

**ANSWER**

Now comes SHELL OIL COMPANY, a Delaware corporation, one of the defendants herein, by PETERSON, LOWRY, RALL, BARBER & ROSS, its attorneys, and for its Answer states as follows:

2, 3, 4, 4A, 14A, 22 and 23. Defendant admits the matters and allegations contained in paragraphs 2, 3, 4, 4A, 14A, 22 and 23.

Further answering, defendant states that as to the remaining allegations and matters contained in all other paragraphs, it is without information or facts sufficient to form an opinion or belief.

WHEREFORE, SHELL OIL COMPANY, a corporation, one of the defendants herein, prays that the plaintiff's complaint should be dismissed as against the defendant, SHELL OIL COMPANY.

PETERSON, LOWRY, RALL,
BARBER & ROSS
By: OWEN RALL
*Attorneys for Defendant*

PETERSON, LOWRY, RALL, BARBER & ROSS
135 South LaSalle Street
Chicago 3, Illinois
ANdover 3-7300

[072] [Certificate of Service Omitted in Printing]

[074] [Caption Omitted]

**ANSWER**

Now come the defendants, Harry L. Hulman, Successor Director of the Department of Revenue of the State of Illinois, and William G. Clark, Attorney General of the State of Illinois, by William G. Clark, Attorney General of the State of Illinois, their attorney, and for their joint answer to the complaint amended herein, they and each of them say:

1. Admit the allegations of fact of Paragraphs one, two, three and four of plaintiff's complaint as amended;

2. Deny the allegation of Paragraph five and assert that plaintiff's complaint represents an improper attempt as a class action and wrongfully assumes a common interest in questions of law and fact necessary in such actions;

3. Deny the allegations of Paragraph six of said complaint and state that plaintiff has waived any right or privilege to [075] proceed under the *Owens-Illinois Glass Company*, vs. *McGibbin*, decision by pursuing the remedies provided under Illinois Revised Statutes, 1961, Ch. 127, Secs. 172, 172(a);

4. Admit the allegation of Paragraph seven of said Complaint;

5. That they have no knowledge sufficient to form a belief as to the truth or correctness of the allegations contained in Paragraphs eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen and twenty of said complaint and therefore neither admit nor deny but demand strict proof thereof;

6. Admit the existence of correspondence from time to time by employees of the Department of Revenue but deny the conclusions and opinions of plaintiff relating to such correspondence as alleged in Paragraph twenty-one of said complaint. If as plaintiff alleges the existence of a prior administrative policy or practice exempting such transactions, such policy or practice, if erroneous can not inure to the benefit of plaintiff. Defendants further deny that either of the exhibits attached to and made a part of the complaint support any such allegation of any ruling by the Director of Revenue with respect to the transactions in question;

7. Deny that any interpretation of the transactions herein involved by the auditors of the Department of Reve-

nue has any binding effect on the issue raised in the complaint. Defendants further deny any official ruling exempting the matter in controversy as alleged in Paragraph twenty-two of said complaint;

[076] 8. That they have no knowledge sufficient to form a belief of the allegations contained in Paragraph twenty-three and neither admit nor deny, but demand strict proof thereof;

9. That they have no knowledge sufficient to form a belief as to the truth or correctness of the reliance placed by plaintiff on any matter relating to the Use Tax in question as alleged in Paragraph twenty-four and these defendants state that the remaining allegations of fact contained in said paragraph, which are descriptive of plaintiff's transactions, clearly disclose that the plaintiff is engaged in a taxable use and that said plaintiff has not paid to any of these defendants the tax provided by the Use Tax Act upon and with reference to the matters set forth in the said complaint, at the rate or the amount prescribed by said Statute;

10. Admit the issuance of the Bulletin as alleged in Paragraph twenty-five, and a copy of said Bulletin is attached hereto and made a part of this Answer;

11. Paragraph twenty-six states various conclusions that the defendants deny;

12. Paragraph twenty-seven states various conclusions of the pleader and the Bulletin issued on June 3, 1963, and the Use Tax Act, are the best source to determine what is asserted or attempted to be asserted as the same apply to plaintiff;

13. Paragraphs twenty-seven, twenty-eight, twenty-nine, thirty, thirty-one, thirty-two, thirty-three, thirty-four and [077] thirty-five state various conclusions and opinions of

the plaintiff that these defendants deny, the same being legal conclusions of plaintiff;

14. Deny the allegations of Paragraphs thirty-six and thirty-seven, the same being legal conclusions and opinions of plaintiff. Defendants assert that within the meaning of the Use Tax Act, the Bulletin issued on June 3, 1963, clearly stated that "the purpose of this Bulletin is to clarify the Department's position. . . . ." and said Bulletin did not in any manner alter or change existing law. Nor did said Bulletin recognize or admit that plaintiff was excluded or exempt from the operation of the Use Tax Act with reference to the transactions set forth in the said complaint;

15. That notwithstanding the plaintiff's assertion to the contrary, The Use Tax Act, as amended, is in all respects valid and constitutional as are the regulations and Bulletins of the Department of Revenue as promulgated under that Act and as are the actions of the defendants which this suit seeks to enjoin. More particularly neither the Use Tax Act nor any regulation or Bulletin of the Department of Revenue, nor any action of the defendants in enforcing that Act violate the Use Tax Act or Article I, Section 1, Article II, Section 2 and 14, and Article IV, Section 13, of the Constitution of the State of Illinois. Nor does the Act, Regulations or Bulletins violate Article I, Section 8 or 10, or the 14th Amendment to the Constitution of the United States;

16. That plaintiff has a full and adequate remedy at law for the determination of its tax liability under the Use Tax Act, [078] 1961 Illinois Revised Statutes, Ch. 120, Pars. 439.1 to 439.22, such legal remedy and the procedure to be followed having been specifically provided for by and contained within, the terms and provisions of said aforementioned Act. Plaintiff also has a full and complete statutory remedy provided in Section 2(a) of "An Act in relation to the payment and disposition of monies received for and

on behalf of the State", approved June 9, 1911, as amended by Act approved May 15, 1961, 1961 Illinois Revised Statutes, Ch. 127, Sec. 172;

17. That plaintiff's complaint is insubstantial and insufficient and fails to state a cause of action to permit a Court of Equity to take jurisdiction;

18. The construction of the Use Tax which results in the imposition of the Use Tax on plaintiff's transactions described in the complaint filed herein is a proper construction and interpretation of said Act.

WHEREFORE, the defendants pray that plaintiff's complaint be dismissed for want of equity, the injunction heretofore entered be dissolved and vacated, judgment be entered in favor of defendants, and that these defendants may have such other and further relief in the premises as shall be just and equitable.

HARRY L. HULMAN, Director of Revenue of the Department of Revenue of the State of Illinois

by: WILLIAM G. CLARK
William G. Clark, Attorney General
of the State of Illinois
Attorney for the defendants

[079] [Jurat Omitted in Printing]

[080] State of Illinois
DEPARTMENT OF REVENUE
Springfield

Theodore J. Isaacs
Director

Albert R. Imle
Assistant Director

**BULLETIN**

**RE: TEMPORARY STORAGE OF MOTOR FUEL UNDER PROVISIONS OF THE USE TAX ACT**

The purpose of this bulletin is to clarify the Department's position concerning the temporary storage provisions of the Use Tax Act and their relationship to fuel consumed by a common carrier.

The Department's position is that temporary storage ends and a taxable use occurs when the fuel is taken out of storage facilities and is placed into the tank of the airplane, railroad engine or truck. At this point, the fuel is converted into its ultimate use, and, therefore, a taxable use occurs in Illinois.

If a common carrier does not have separate facilities for transferring the fuel out of the State of Illinois but always puts it into the tank of the airplane, railroad engine or truck for final consumption, then they no longer will be able to give a certificate to the vendor stating that the fuel is purchased within the temporary storage provisions of the Use Tax Act, but must pay the use tax to their supplier.

THEODORE J. ISAACS
Theodore J. Isaacs
Director of Revenue

Issued: June 3, 1963

[098] [Caption omitted]

## STIPULATION

It is hereby stipulated and agreed between United Air Lines, Inc., plaintiff, and Marshall Korshak, Director of Revenue of the Department of Revenue of the State of Illinois, William G. Clark, Attorney General of the State of Illinois, and Shell Oil Company, defendants, that:

1. United Air Lines, Inc. ("United") is a Delaware corporation qualified to do business in the State of Illinois, and is engaged in the business of transporting persons, property and United States Mail by air on scheduled and chartered flights in interstate and foreign commerce.[1] Until its merger into United on June 1, 1961, Capital Airlines, Inc. ("Capital") was also a Delaware corporation qualified to do business in the State of Illinois, and was engaged in the business of transporting persons, property and United States mail by air on scheduled and chartered flights in interstate commerce.[2]

2. All such scheduled and chartered flights are made pursuant to Certificates of Public Convenience and Necessity, conferring authority to fly particular routes and issued to United by the Civil Aeronautics Board, and pursuant to Operating Certificates and Operations Specifications prescribing the manner in which aircraft are to be flown over those routes and issued to United by the Federal Aviation Agency. All such Certificates and Specifications are issued under authority of the Federal Aviation Act of 1958, as amended (49 U.S.C. §§ 1301 *et seq.*).

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[1] United also provides scheduled intrastate service within various states, including, in Illinois, a limited number of flights between Chicago and Quad-Cities Airport, Moline. United has also performed a few charter flights between points within Illinois. United, however, pays Illinois Use Tax on fuel consumed on such intrastate flights (see footnote 6, below), and this lawsuit therefore involves only United's interstate and foreign operations.

[2] Capital provided no intrastate service in Illinois.

United's scheduled service is presently provided over a route system extending, via numerous intermediate points from the East to the West coasts and Hawaii, north and south along both the Atlantic and Pacific seaboards and, generally, north and south from the Middle Atlantic and New England states to the Gulf of Mexico.[3]

This route system consists of 17,420 unduplicated route miles, of which only 256 route miles, or less than 1.6% are within Illinois. It includes service on interstate and foreign flights to 110 cities in 32 states, the District of Columbia and Canada.

United presently provides scheduled interstate service from O'Hare and Midway airports in Chicago to 55 cities in 20 states and the District of Columbia. Such service involves an average of approximately 4,580 departing flights per month, more than half of which are continuations of interstate flights that both begin and end outside Illinois and on which Chicago is a stopover point.

United also performs an average of approximately 21 monthly charter flights in interstate and foreign commerce between Chicago and various points in the United States and Canada.[4]

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[3] A summary map showing United's principal certificated routes is atttached to United's Amended Complaint as Exhibit A. A detailed map showing all of United's certificated routes is attached to this Stipulation as Appendix 1.

[4] The information and average figures given in this paragraph and elsewhere in this Stipulation and Appendix 2 are based on United's operations during 1964. Average figures for prior years would run generally but not substantially lower, and, except for some duplication of routes, the description of United's present operations is a generally accurate description of the total of United's and Capital's separate operations prior to the merger. Of the present average of 4,580 scheduled departures per month, approximately 60 (2 daily) are from Midway; the remainder are from O'Hare. Prior to the temporary discontinuance of service from Midway in July, 1962, a much higher percentage of flights departed from Midway. United did not operate from Midway between July 9, 1962 and July 5, 1964.

3. Because United's operations are under Federal authorization of the Certificates of Public Convenience and Necessity, Operating Certificate and Operations Specifications referred to in Paragraph 2, United's interstate and foreign operations are regulated and controlled by various agencies and instrumentalities of the Federal government. Among other things:

United's tariffs (fares, rates and terms and conditions of carriage) are filed with and subject to the approval of the Civil Aeronautics Board.

Under the Federal Aviation Act, United is required to provide regularly scheduled service over all portions of its route system unless specifically authorized to suspend such service by the Civil Aeronautics Board, and is required to file all its schedules with the Civil Aeronautics Board and the United States Post Office Department. (14 Code of Federal Regulations, Part 231 (1964).)

Under the Federal Aviation Act (49 U.S.C. § 1375), the Post Office Department has extensive authority to require airlines, such as United, to affirmatively establish schedules which meet the needs of the Post Office Department; conversely, the Post Office Department has a veto power over proposed schedule changes which would adversely affect its postal operations. Approximately 99.5% of United's flights from O'Hare and Midway Airports are operated according to such schedules.

Scheduled air carriers, such as United, are required to perform their established schedules, unless good cause, such as weather conditions or equipment difficulties, is shown. To that end, the Civil Aeronautics Board regularly monitors the scheduled performance of all airlines, including United. (14 C.F.R. Part 234 (1964).)

Pursuant to the Federal Aviation Act, the Federal Aviation Agency has established a national air traffic control system whereby the actual routes between airports of all commercial aircraft are fixed. Under such control, no United aircraft may depart from O'Hare or Midway until its flight plan has been approved by the Federal Aviation Agency officer in charge, and the course and altitude of aircraft are assigned throughout all flights. Subject to certain exceptions near busy airports, the routings are on fixed courses which are much like aerial highways.

Such routes, as they apply to a given route segment to be flown and as assigned by the federal air traffic control authorities, must be followed by aircraft proceeding in accordance with instrument flight rules promulgated by the Federal Aviation Agency. To comply with its federally issued Operations Specifications (14 C.F.R. § 40.18 (1964)), United must conduct all of its turbojet flights in accordance with instrument flight rules (except in terminal areas when in radio contact with air traffic control) and, consequently, along designated air space routes unless radar vectored elsewhere by air traffic control. As a matter of policy, United conducts all of its flights (turbojet, turboprop and piston aircraft) enroute in accordance with instrument flight rules and along designated air space routes. While operating under instrument flight rules aircraft are controlled as to routing, altitude and airspeed by the air traffic control function of the Federal Aviation Agency. Normally, flights to given destinations are assigned the same routings day after day.

Federal Aviation Agency regulations (14 C.F.R. §§ 42a, 52 (1964)) require that all commercial aircraft, including those of United, carry a minimum specified amount of reserve fuel over and above that required to carry the particular aircraft to its scheduled destination. Such regulations

also require, that, where it is uncertain if weather conditions at the scheduled destination will permit landing, additional fuel necessary to take the aircraft from the scheduled destination to a specified alternate destination must be carried.[5] (14 C.F.R. §§ 42a, 52 (1964).)

United must submit to the Federal Aviation Agency for its ratification Flight Manuals for each type of aircraft operated by it. Among other things, such Flight Manuals must specify: engine power settings for all phases of flight, including run-up (for piston aircraft), take-off, climb and cruise; detailed fuel consumption data for all operating conditions, in terms of weather conditions, loaded weight of aircraft and engine power settings during all phases of flight; equipment and instrument check-out procedures; various additional take-off, landing and other flight procedures.

4. All of United's flights are made with aircraft which were purchased or leased by, and delivered to, United outside Illinois and which include fuel storage tanks as integral parts thereof. These tanks are for the storage of fuel prior to the time it is pumped from such tanks through a system of fuel lines into the aircraft engines and there burned in taxiing, take-off, and flight.

5. All of the fuel involved in this litigation is consumed in the interstate and foreign commerce described in the foregoing paragraphs.[6]

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[5] Reserve fuel requirements and the manner in which basic fuel requirements are computed are described in paragraph 10 and Appendix 2.

[6] United pays Illinois Use Tax on fuel purchased in Illinois, as well as on fuel consumed on intrastate flights in Illinois, including:

(a) flights originating in Chicago and terminating at Moline;
(b) training flights which both depart from and return to Illinois; and
(c) charter flights between points within Illinois.

6. All such fuel (aviation gasoline for piston aircraft and kerosene for turboprop and jet aircraft) is purchased by United from Shell Oil Company, and is delivered to United, with possession, title and all risk of loss passing to United, either at Hammond, Indiana or at East Chicago, Indiana.[7]

7. All such fuel is thereafter transported by pipeline or tank trucks, by common carriers under contract to United, normally on a daily basis, to ground fuel storage facilities located within Illinois, on or near O'Hare or Midway Airports in Chicago, where it is stored prior to being transferred to the fuel storage tanks of aircraft. The period of storage in such ground fuel storage facilities ranges from a minimum of two days (during which period jet fuel is processed to eliminate impurities) to a maximum of twelve days. The average period of storage ranges, depending on the type of fuel and storage facilities involved, from two and a half to six days.

8. All such fuel is transferred from the ground fuel storage facilities at O'Hare and Midway Airports into the fuel storage tanks of aircraft either by fueling trucks or directly through underground pipes and flexible hoses. Such transfers are made on an average of more than 150 times a day. With insignificant exceptions, all such transfers are made into the fuel storage tanks of aircraft immediately prior to departure, and the fuel so transferred remains in such fuel storage tanks in an unchanged condition until it is pumped through a system of fuel lines into the engines of the aircraft and there burned in taxiing, take-off, and flight. On stopover flights, unused fuel remains stored in the fuel tanks of the aircraft until aircraft is again flown.[8]

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[7] Such purchases and deliveries of fuel have been made under the same arrangement since May 1, 1953.

[8] Occasionally, fuel is removed from the aircraft and replaced in ground fuel storage facilities. In an extremely small number of instances, it may be dumped in flight.

9. By virtue of the control and supervision of the Civil Aeronautics Board and Post Office Department as described in Paragraph 3, and as a matter of commercial, or "competitive," necessity, United is required, weather and condition of equipment permitting, to perform all flights as scheduled.[9] United also is under contract to its passengers and cargo customers to perform all scheduled and chartered flights. In order to perform these regulatory and contractual obligations, United is committed to transport fuel in its aircraft to points outside Illinois.

10. As stated in Paragraph 3, Federal Aviation Agency regulations (14 C.F.R. §§ 42a, 52 (1964)) require that certain fuel load computation procedures be made for every commercial flight. Included in those regulations is the requirement that all commercial aircraft, including those of United, carry a minimum specified amount of reserve fuel. In addition, and as a further safety factor, United's Flight Manuals, filed with and ratified by the Federal Aviation Agency, include requirements that all of its aircraft carry amounts of reserve fuel in excess of those required by Federal Aviation Agency regulation.[10] Accordingly, after the United pilot and the dispatcher at the particular airport have taken into account all of the elements which might affect fuel consumption on a particular flight, such as weight of the aircraft as loaded and weather conditions along the assigned route, and, where weather conditions indicate that a landing at the intended destination may not be possible, have computed the amount of fuel necessary to take the particular aircraft to a specified alternate destination, they must add the specified Federal Aviation Agency

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[9] During the first nine months of 1964, United performed roughly 99% of its scheduled departures from O'Hare and Midway Airports.

[10] Reserve fuel requirements for each type of aircraft operated by United are shown on the table attached to this Stipulation as Appendix 2.

and United Flight Manual reserve fuel requirement to the figure so calculated.[11]

11. As a result of the fuel requirements and procedures described above, coupled with the rigid control of all of United's flight routes by the Federal Aviation Agency as outlined in paragraph 3: (a) approximately 99.75% of United's incoming flights arrive at O'Hare and Midway Airports with fuel aboard equal to or exceeding the reserve requirements imposed directly by the Federal Aviation Agency regulations; (b) approximately 99% of United's incoming flights arrive at O'Hare and Midway Airports with fuel aboard equal to or exceeding the combined reserve requirements imposed by the Federal Aviation Agency regulations and by United's Flight Manuals; (c) all of United's flights departing from O'Hare and Midway Airports arrive at such airports with enough fuel on board to take them beyond the borders of Illinois on the actual route they follow on the outbound leg of their journey; and (d) if the only fuel aboard arriving aircraft were the combined fuel reserve requirements of the Federal Aviation Agency and United's Flight Manuals, 99.3% of United's flights departing from O'Hare and Midway Airports would have arrived with sufficient fuel aboard to take them beyond the borders of Illinois on the actual route they follow on the outbound leg of their journey.[12]

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[11] Fuel is added to that already on board the aircraft to meet the amount specified by the pilot and dispatcher. If the pilot's and the dispatcher's requirements vary, the larger quantity of fuel is loaded. To illustrate the amount of additional fuel carried for alternative destinations, alternate destinations for four engine jet aircraft destined for Chicago, and the amount of additional fuel required for such destinations, respectively are Milwaukee, 6,000 lbs.; Detroit, 11,000 lbs.; Cleveland, 13,000 lbs.; Minneapolis/St. Paul, 16,000 lbs.; and Omaha, 18,000 lbs.

[12] Average figures for fuel on board, fuel loaded and fuel "burned-off" in reaching the Illinois border for various types of aircraft operated by United are shown on the table attached to this Stipulation as Appendix 2.

12. As a further result of the Federal Aviation Agency regulations and United Flight Manual requirements described above, no United aircraft departs from O'Hare and Midway Airports without a minimum dispatch load of fuel on board.[18]

13. From the effective date of the Illinois Use Tax in 1955 through June 3, 1963, United paid the Illinois Use Tax upon the fuel loaded aboard aircraft in Illinois that was actually consumed ("burned-off") in or over Illinois. In addition, since May 1, 1953, Shell Oil Company has collected from United the Indiana Gross Income Tax measured by the purchase price of such fuel paid by United to Shell Oil Company. Since June, 1963, the applicable rate of the Indiana Gross Income Tax has been ½ of 1 per cent. Apart from this, United incurs no State sales, use or similar tax on fuel loaded aboard aircraft in Illinois.

14. The parties have reviewed the documents, charts, surveys, statistical computations and other data supporting the facts set forth in this Stipulation. Except as otherwise specifically indicated, it is understood that statements of present fact have been true continuously from January 1, 1960, and were true of Capital's position and operations prior to its merger into United on June 1, 1961. It is further understood that Appendices 1 and 2 hereto, as well as Exhibits A and D to United's Complaint, referred to herein, are part of this Stipulation.

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[18] Minimum dispatch loads for each type of aircraft operated by United (in all cases more than twice that required to carry the aircraft beyond the Illinois border) are set forth in the table attached to this Stipulation as Appendix 2.

It is further stipulated and agreed that all of the parties hereto shall have the right to offer additional evidence on any matter relevant to the subject matter of this litigation.

UNITED AIRLINES, INC.

/s/ Wm. Bruce Hoff, Jr.

MARSHALL KORSHAK, Director of Revenue of the Department of Revenue of the State of Illinois

/s/ Marshall Korshak

WILLIAM G. CLARK, Attorney General of the State of Illinois

/s/ William G. Clark

SHELL OIL COMPANY
Peterson, Lowry, Rall,
Barber & Ross

/s/ Owen Rall

* * *

Appendix 1 to Stipulation introduced in essentially identical form as United Exhibit 5, Reproduced at page 230, *infra*.

* * *

| Type of Aircraft | Engine Type | Amount Required by FAA (pounds)[15] | Additional Amount Required by UAL's Flight Manuals (pounds) | Total Reserve Fuel (pounds) | Minimum Dispatch Loads[16] (pounds) | Average Fuel on Board Arriving Flights (pounds) | Average Fuel Loaded (pounds) | Average Outbound Fuel on Board (pounds) | Fuel Burn-off to Illinois Border[18] (pounds) |
|---|---|---|---|---|---|---|---|---|---|
| General Dynamics Convair-340 | 2 engine piston | 700 | 500 | 1,200 | 1,200 | | | | |
| Douglas DC-/ 6A/6B | 4 engine piston | 1,350 | 1,000 | 2,350 | 7,680 | | | | |
| Douglas DC-7/7B | 4 engine piston | 1,890 | 1,000 | 2,890 | 7,550 | | | | |
| Vickers Armstrongs Viscount | 4 engine turbo-prop | 2,200 | 1,000 | 3,200 | 3,200 | | | | |
| Sud Aviation Caravelle | 2 engine jet | 4,000 | 2,000 | 6,000 | 8,500 | 13,350 | 14,550 | 27,900 | 4,200 |
| Boeing-727 | 3 engine jet | 5,400 | 2,700 | 8,100 | 12,000 | 18,350 | 15,350 | 33,700 | 5,600 |
| Boeing-720 | 4 engine jet | 8,000 | 4,000 | 12,000 | 18,000 | 23,600 | 28,600 | 52,200 | 8,700 |
| Douglas DC-8 (JT3C-6 engine) | 4 engine jet | 8,000 | 4,000 | 12,000 | 26,000 | | | | |
| Douglas DC-8 (JT4 engine) | 4 engine jet | 8,500 | 4,000 | 12,500 | 26,000 | 25,400 | 34,100 | 59,500 | 8,400 |
| Douglas DC-8 (JT3D-1 engine) | 4 engine jet | 8,000 | 4,000 | 12,000 | 26,000 | | | | |
| Douglas DC-8F (JT3D-3) | 4 engine (cargo) | 8,000 | 4,000 | 12,000 | 26,000 | | | | |

[14] See paragraph 10 of the Stipulation.

[15] One gallon of turbine fuel (for turbo-prop and jet engines) equals approximately 6.8 pounds and one gallon of aviation gasoline (for piston engines) equals approximately 6 pounds.

[16] See paragraph 12 of the Stipulation.

[17] Average fuel figures for arriving and departing flights are not now available for piston or turbo-prop aircraft or for certain jet aircraft. United was not operating out of Midway during the periods in which the information reflected in these columns was collected. However, the same basic operating conditions are applicable to both airports.

[18] Precise burn-off figures are now available for only west and northwest bound flights. Accordingly, since eastbound flights involve only a few miles inside Illinois, average figures for all flights would be significantly smaller than the average shown in this column. United has no southbound departure routes from O'Hare or Midway.

[Caption Omitted]

[146] **ADDITIONAL STIPULATION**

It is hereby stipulated and agreed between United Air Lines, Inc., plaintiff, and Theodore A. Jones, Director of Revenue of the Department of Revenue of the State of Illinois, William G. Clark, Attorney General of the State of Illinois, and Shell Oil Company, defendants, that:

1. From August, 1955 when the Use Tax Act was enacted to June 3, 1963, the Department of Revenue uniformly and consistently interpreted and applied the Illinois Use Tax Act to fuel purchased outside Illinois by interstate airlines and railroads, brought into the State and stored here by them prior to the use of such fuel by them in propelling aircraft and trains in interstate commerce so that only that portion of the fuel actually consumed ("burned off") in or over Illinois was subjected to the Illinois Use Tax.

2. In reliance upon the facts stated in paragraph 1, numerous railroads and airlines (that purchased fuel outside the State of Illinois, caused it to be brought into Illinois and temporarily stored here before use in interstate movements of aircraft and trains) computed and paid Illinois Use Tax according to burn-off formulas.

3. Pursuant to this interpretation, United computed and paid its Illinois Use Tax on fuel loaded at Midway and O'Hare Airports in Chicago from August 1955 to June 1963 on a burn-off basis. Payments of Illinois Use Tax on aircraft fuel on this burn-off basis for the period July 1, 1959 through December 31, 1962, were audited by the Department of Revenue and approved by it subject to minor computational adjustments.

The facts herein stipulated are in addition to those set forth in the Stipulation between the parties filed with this Court on January 19, 1966.

It is further stipulated and agreed that all of the parties hereto shall have the right to offer additional evidence on any matter relevant to the subject matter of this litigation.

UNITED AIR LINES, INC.

By /s/ MARK H. BERENS

THEODORE A. JONES, Director of Revenue of the Department of Revenue of the State of Illinois

By /s/ THEODORE A. JONES

WILLIAM G. CLARK, Attorney General of the State of Illinois

By /s/ WILLIAM G. CLARK

SHELL OIL COMPANY
By PETERSON, LOWRY, RALL, BARBER & ROSS

By /s/ OWEN RALL

[149] [Caption Omitted]

**AMENDED ANSWER**

Now comes SHELL OIL COMPANY, a Delaware Corporation, one of the defendants herein, by Peterson, Lowry, Rall, Barber & Ross, its attorneys, by leave of court first had and obtained, and for its Amended Answer to the Amended Complaint heretofore filed by United Air Lines, Inc., states as follows:

2, 3, 4, 4A, 14, 14A, 15, 22 and 23. Defendant admits the matters and allegations contained in paragraphs 2, 3, 4, 4A, 14, 14A, 15, 22 and 23.

Further answering, defendant states that as to the remaining allegations and matters contained in all other paragraphs, it is without information or facts sufficient to form an opinion or belief.

WHEREFORE, SHELL OIL COMPANY, a corporation, one of the defendants herein, prays that the plaintiff's complaint should be dismissed as against the defendant, SHELL OIL COMPANY.

PETERSON, LOWRY, RALL, BARBER & ROSS

By Owen Rall
Attorneys for Defendant

PETERSON, LOWRY, RALL, BARBER & ROSS
135 South LaSalle Street
Chicago, Illinois 60603
ANdover 3-7300,
Attorneys for SHELL OIL COMPANY, Defendant

[151] [Caption Omitted]

## ORDER OF PERMANENT INJUNCTION

This cause coming on to be heard on the motion of United Air Lines, Inc., plaintiff, by its attorneys, the Court being advised by the Attorney General as the attorney for the defendant, Theodore A. Jones, Director of Revenue of the Department of Revenue of the State of Illinois, that all Notices of Proposed Assessments, if any, relating to fuel loaded into plaintiff's aircraft in Illinois during the period prior to July 1, 1963, will be withdrawn and that the Department of Revenue has abandoned its claim with respect to such fuel for said period, and the Court being further advised by the attorneys for plaintiff that plaintiff will withdraw its claim for credit (aggregating $49,020.15) for the use tax paid during said period,

IT IS ORDERED that Theodore A. Jones, Director of Revenue of the Department of Revenue of the State of Illinois, his representatives and successors in office, be, and they [152] and each of them are hereby permanently restrained from in any way, directly or indirectly, imposing, assessing or collecting or attempting to impose, assess or collect a use tax upon any fuel loaded into plaintiff's aircraft in Illinois during the period prior to July 1, 1963.

DATED: February 14, 1968

Thomas Donovan
Judge

[154] [Caption Omitted]

## ANSWER TO AMENDED COMPLAINT

Now comes Theodore A. Jones, Successor Director of Revenue of the Department of Revenue of the State of Illinois, and WILLIAM G. CLARK, Attorney General of the State of Illinois, by WILLIAM G. CLARK, Attorney General of the State of Illinois, their attorney, and for their supplemental joint answer to the amended complaint herein, they and each of them say:

4A: Admit the allegations of paragraph 4A of said amended complaint.

14A: Admit that part of the allegations contained in paragraph 14A wherein it is stated that Shell Oil was the seller of the fuel during the applicable period involved. Defendants deny the remaining allegations as conclusions of Plaintiff.

WILLIAM G. CLARK, Attorney General of the State of Illinois
Attorney for the Defendants.

[155] [Jurat Omitted in Printing]

**REPORT OF PROCEEDINGS**

• • •

[2] MR. BERENS: We are ready for trial today, Your Honor, but before that, we've got a couple of preliminary matters. Here is an agreed order for permanent injunction on the so-called past period that is running from January 1, 1960, through June 30, 1963.

For your recollection, that is not in protest fund.

THE COURT: I understand.

MR. BERENS: The temporary injunction was against any assessment—

THE COURT: Pending the outcome of this litigation, there will be a fund available.

MR. BERENS: Yes, for the so-called current period, which is all that remains in the case after you have [3] signed that order and which is in the protest fund.

MR. CAMPBELL: I would like to explain to the Court the basis for this order. The taxpayer raised in Paragraph 36 of their complaint, as amended, the question of the retroactive application of the bulletin, which was issued by the Director of Revenue on June 3, 1963. And in order to avoid that problem and because of the *Pressed Steel Car* case, the Department has decided not to assert the tax claim for the period prior to the date mentioned in the order and that is the reason for the order.

So we have no objection to the entry of the order.

THE COURT: All right.

• • •

[5] MR. BERENS: As I stated a moment ago, Your Honor, United Air Lines is ready for trial. And if it please the Court, I would like to make a brief opening statement—

THE COURT: Please do.

MR. BERENS: —to refresh everyone's memory of the issues.

THE COURT: Please proceed.

MR. BERENS: The order that you just entered took the past period out of the case. So the issue and the liability, if any, for use tax in this matter starts July 1, 1963, and continues up to the present.

We have before the Court as part of the relief requested a motion for permanent injunction against assessment for the present period and there is a protest fund injunction that has been issued by the Court. And the amount in controversy up to the current date is in the protest fund with the State Treasurer.

THE COURT: Is this prior to July 1, '63?

MR. BERENS: No, that commences as of July 1, '63, Your Honor.

• • •

[20] MR. HOFF: Exhibit No. 3 is the bulletin that has caused all the troubles here. June 3, 1963, bulletin signed by Theodore J. Isaacs, Director of Revenue.

• • •

[22] WILLIAM LOUIS MOORE, JR.

was called as a witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HOFF:

Q. Would you state your name, please?

A. William Louis Moore, Jr.

THE COURT: M-o-o-r-e?

THE WITNESS: M-o-o-r-e, yes, sir.

MR. HOFF: Q. Where do you live, Mr. Moore?

A. I live at 350 Forest Road, Hinsdale, Illinois.

Q. And by whom are you employed?

A. By United Air Lines.

Q. Very briefly, Mr. Moore, would you outline the history of your employment with United?

A. I was employed in January, 1940. I worked for two years on the West Coast in the Reservations Department.

I went into military service, January, '42; returned to United Air Lines in March of '46.

Since that time, I have been in the Schedule Planning Department, and I am now Director [23] of Schedule Planning for United.

Q. What are the responsibilities of the Schedule Planning Department of United, Mr. Moore?

A. To plan and coordinate them internally, all of United schedules, systems schedules for passengers and cargo.

Q. Does the responsibility of that department include arranging for technical facilities and aircraft?

A. Not for technical facilities in aircraft.

Q. I meant to say and aircraft.

A. Indirectly, yes, we—

Q. In what way, please?

A. We are involved almost continually in the planning for the numbers and types of equipment that United will order, the facilities that we will build at various airports.

Q. All right.

MR. CAMPBELL: Your Honor, if I may just make a statement here, I don't know what the witness intends to testify to, but certainly we stipulate that United Air Lines is an airline, and, of course, they have scheduled flights. [24] I don't know if we can shorten the hearing in so far as the technical aspects or the operational aspects, but we are willing to agree, of course, that they are an airline and that they do maintain schedules as well as, I suppose, unscheduled flights. If this will facilitate the—

MR. HOFF: I think this witness is going to speak for much more than merely the fact that United is an airline and runs a schedule.

I was just giving his background quite briefly.

THE COURT: Yes, background qualifying him for subsequent testimony.

I think the Court could even take judicial knowledge of the fact that United Air Lines is an airline.

MR. HOFF: Q. Mr. Moore, I show you United Group Exhibit 4 for identification and ask you to state what that exhibit is.

A. This is the Federal authority issued by the Civil Aeronautics Board which covers our certificate of public convenience and necessity. It outlines the cities and the routes over which [25] United is permitted and required to provide passenger and cargo service.

(The document above referred to was marked Plaintiff's Group Exhibit 4 for identification.)

MR. HOFF: Q. Has United held these certificates authorizing it to fly essentially the same routes from 1963 on?

A. Yes, it has. There are minor revisions as time goes on, but these are essentially the same.

Q. Does United provide any intrastate service in Illinois, Mr. Moore?

A. We do, between Chicago and Moline.

THE COURT: That was in your certificate, wasn't it?

MR. HOFF: The sole purpose in—

THE COURT: All right.

MR. HOFF: This is the only question I intend to ask, and I would like to make the comment to the Court at this point that, of course, we pay the tax on the Chicago to Moline traffic.

THE COURT: I understand that's in your original [26] stipulation.

MR. HOFF: And in the stipulation and other information that is to be presented here, all figures relating to Chicago-Moline have been broken out or are otherwise explained in the exhibits themselves.

I just wanted to make that explanation for the Court's benefit.

THE COURT: Very well, I understand.

MR. HOFF: Q. Mr. Moore, I now show you United's Exhibit 5 for identification, and ask you what that document is.

A. This is a geographic portrayal of the cities and routes that United Air Lines is authorized to serve under the C.A.B. certificate.

(The document above referred to was marked Plaintiff's Exhibit 5 for identification.)

MR. HOFF: Q. How many cities does United currently serve, Mr. Moore?

A. There are 105.

Q. In serving the route system portrayed on that exhibit, how many takeoffs and landings does [27] United make per day?

A. In December, we averaged 1,769 takeoffs and the same number of landings each day.

Q. Does that include any all-revenue producing flights?

A. That is only the revenue producing flights, the scheduled, the charter and extra section flights.

Q. Mr. Moore, I now show you a document marked "United Exhibit 6 for identification," and I ask you what that document is.

A. This is our system timetable effective January 15, which lists all the flights that we operate in the period shown here effective January 15, 1968.

THE COURT: '68?

THE WITNESS: Yes, sir.

(The document above referred to was marked Plaintiff's Exhibit 6 for identification.)

MR. HOFF: Q. How long in the normal course will that schedule remain in effect, Mr. Moore?

A. In the normal course, it would remain in [28] effect some four to eight weeks. This happens to be effective for six.

MR. CAMPBELL: Your Honor, we don't intend to be

technical, but we would like to object to this line of questioning as not having a bearing on the issues raised in the complaint.

THE COURT: I don't know that it has or not at this point, Mr. Campbell.

I will overrule your objection at this time. If it has no bearing, you may renew it later.

MR. HOFF: All right, I would like to offer these three —well, no. I will hold that for a moment, if the Court please.

Q. I now show you United Exhibit 7 for identification and ask you what—will you tell us what that document is?

A. This is a list of United airplanes.

(The document above referred to was marked Plaintiff's Exhibit 7 for identification.)

MR. CAMPBELL: We would renew the same objection to this document, Your Honor.

[29] THE COURT: The ruling will be the same.

THE WITNESS: This is a list of our airplanes that we own and operated as of the 31st of December, 1967.

It is broken down hereby jet, jet-prop, and piston; and it also shows the number in scheduled service, the support aircraft, and those which are grounded and waiting disposal.

MR. HOFF: Q. In other words, 295 aircraft during this period were actually—

MR. CAMPBELL: We object to counsel commenting on the exhibit, Your Honor.

THE COURT: Objection will be sustained.

THE WITNESS: It shows 295 in scheduled service.

MR. CAMPBELL: We object to the witness reading from it.

THE COURT: Yes, it speaks for itself.

Well, I don't know, Mr. Counsel, now from looking at it. It may need some explanation.

MR. HOFF: Q. By "scheduled service," what is referred to?

THE COURT: I don't know what "aircraft" means [30] by United. I think I would like some enlightenment on it.

Objection will be overruled.

MR. HOFF: Q. By "aircraft in scheduled service," Mr. Moore, what is intended by this heading on this exhibit?

A. These are the airplanes actively used or assigned to scheduled operations as of that date.

Q. And by "scheduled aircraft"—

A. As opposed to support aircraft, which are those that are in training, in project work, in maintenance, assignment in overhaul, and the grounded aircraft are eleven Viscounts which had been withdrawn from service. They are on the ground awaiting disposal.

Q. All right, Mr. Moore, in order to make the average of 1,769 takeoffs per day which you have just referred to, how many takeoffs per day must these 295 aircraft assigned to scheduled service make?

MR. CAMPBELL: Objection, Your Honor. Calls for a conclusion of the witness.

[31] THE COURT: It is a mathematical process, I suppose, unless some make more than others. I don't know.

Objection is overruled. May answer.

THE WITNESS: Your Honor, you are right; some do make more than others. Some aircraft will make only one departure a day. We get as high on some airplanes as fifteen. The average comes out to six, and, as a general rule, the most frequent number would be in the neighborhood of five to six to seven per day per aircraft.

THE COURT: That is takeoffs and landings?

THE WITNESS: Takeoffs and landings, of course, would be the same number.

THE COURT: It happens to be the same. It just can't stay up there.

THE WITNESS: That's right.

MR. HOFF: Your Honor, at this point, I would like to offer into evidence United's Exhibits 4, 5, 6, and 7, which are the route certificates, the route map, the United schedule, and Table No. 7, which lists the aircraft, and by way of explanation, I would like to state to the Court that these [32] exhibits constitute the basis upon which later evidence will be predicated, summaries of statistical nature.

MR. CAMPBELL: We renew our objections to the exhibits, Your Honor.

THE COURT: Do you wish to have me withhold ruling until you cross examine on these?

MR. CAMPBELL: Beg pardon?

THE COURT: You do wish to have the Court withhold its ruling until you have had a chance to cross examine on these?

MR. CAMPBELL: No, Your Honor, we do not wish.

THE COURT: They will be admitted.

(Said documents, heretofore marked Plaintiff's Exhibits 4, 5, 6, and 7 for identification, were admitted in evidence.)

[33] MR. HOFF: Q. Moving now, if we may, Mr. Moore, from the general to the specific, and confining ourselves for the moment only to the operations of United Air Lines, could you tell us in a very general way how Chicago fits into these operations out of O'Hare, how Chicago fits into this general nation-wide pattern of operations that we have been discussing?

A. Our operation at O'Hare is the largest that we have in the system. We enplane more passengers, we have more flights than anyplace else. It is the hub of our operation, the focal point, as far as our connecting services, both on line and off line to—that is, connections from United to

United, or connections between United and other carriers both trunk and local service carriers.

Q. What fact is responsible for this situation, Mr. Moore, fact or facts, if any?

A. Well, first, Chicago is the center of a large metropolitan complex and there is a great amount of traffic destined to or enplaning in Chicago.

[34] MR. CAMPBELL: We would object to the question, Your Honor. The witness was called upon to state a conclusion as to why Chicago happens to be the largest operational center.

We think that this calls for a conclusion. He is called upon to interpret facts.

THE COURT: Well, no. I think this witness is fairly qualified to answer the question.

Objection will be overruled.

MR. HOFF: Q. Go ahead, Mr. Moore.

A. In addition to its—to the needs of Chicago, it is a metropolitan complex by, you could call it, geographic circumstances. It represents a connecting point here in Chicago for that traffic which flows from one part of the country to another.

In Chicago, United, in particular, has a large number of passengers who connect each day, coming into Chicago, let us say, from the East and connecting at Chicago to go to the West Coast, or vice versa, or to off-line points to the South. As a matter of fact, the connections at Chicago are so great that they really help support the over-all operation of Chicago or to carry that one step [35] further, if the traffic at O'Hare was all and only that destined to and from Chicago, we would have far fewer departures and arrivals at O'Hare. The connecting traffic adds to the complexity.

Q. So far, you have been talking about United, I take it?

A. Yes, sir.

Q. To what extent is the same thing true of other airlines? If we might, if you would, please, let us talk about other trunk carriers like United, as opposed to local service carriers.

MR. CAMPBELL: If he knows.

MR. HOFF: If he knows, oh, yes. If he doesn't know, why . . .

THE WITNESS: United is the largest of the trunk carriers, but the other trunks have similar situations as United has. Some more with the off line, the terminal carriers, such as Braniff and Continental who terminate here, would have connecting complexes and connection passengers off line—

THE COURT: Excuse me.

(Short interruption.)

MR. HOFF: Q. The last question, I believe, [36] related to the extent to which the circumstances which we have been talking about affected the other trunk carriers. Had you completed your answer, Mr. Moore? I personally don't recall.

A. I think so.

THE COURT: I hope so on the record.

MR. HOFF: Q. Well, now, how about the local service carriers? To what extent, if at all, are they in the same situation?

A. They are in much the same situation as the trunks, except that most of the local service operation terminates and originates in Chicago. And to that extent, they rely even more upon the connecting business at Chicago.

Q. All right, Mr. Moore, I show you a document marked United Exhibit 8 for identification, and I will ask you to state what that exhibit shows.

A. What we have here is the projection for the third quarter, 1967, of the category of passengers handled by United Air Lines at O'Hare on an average day.

Q. Only one day, is that correct?

A. This is an average per day, yes.

[37] (The document above referred to was marked Plaintiff's Exhibit 8 for identification.)

MR. HOFF: Q. Why has the third quarter of 1967 been used, Mr. Moore?

A. This is the last quarter for which complete records are available.

Q. Referring to part A of this exhibit, on what are the figures given in that part of the exhibit based?

A. The through-line passengers carried through Chicago are an actual count based on company records. The sixth line, which are the total daily passenger volume in Chicago, is likewise based upon actual records.

The breakdown of the originating passengers enplaned and the destination passengers deplaned is based upon a study completed about five years ago, and it incorporates the ratios which were derived at that time between originating passengers enplaned, passengers carried through, and passengers connecting between United flights, and passengers connecting between United and other [38] carriers.

Q. And with respect to Part B of this exhibit, on what are those—upon what is that figure based?

A. That is based upon an actual first quarter '67 record of the local Chicago-Moline passengers in intrastate service expanded by fifteen per cent, which is the normal expansion we had systemwide between the first and third quarter of '67.

Q. Are the records to which you have just referred present in the courtroom?

A. I have the basic records in my briefcase. I failed to bring them up with me.

Q. That's all right.

A. They are part of the United station summary statistics.

MR. HOFF: Your Honor, I will offer United Exhibit 8 for identification.

THE COURT: Have you seen it?

MR. CAMPBELL: Same objection, Your Honor.

THE COURT: It will be admitted.

[39] (Said document, heretofore marked Plaintiff's Exhibit 8 for identification, was admitted in evidence.)

[40] MR. HOFF: Q. Excluding passenger growth to the extent that it has or might in the future exist, has the relationship between interstate and intrastate passengers handled by United been substantially the same from 1963 to date?

A. Yes, sir.

Q. And is there any reason to suppose that that relationship would change in the future?

MR. CAMPBELL: Object, Your Honor.

THE COURT: Objection will be sustained.

MR. HOFF: Well, it is not that important a point, Your Honor. But the man—well, let me put it this way:

Q. Based on your experience in this business, Mr. Moore, do you have an opinion as to whether this relationship is likely to change in the future?

MR. CAMPBELL: Same objection, Your Honor. We feel that the answer to this question is not relevant to the issues.

THE COURT: Well, I am wondering about that.

MR. CAMPBELL: It relates to a future matter.

THE COURT: It relates to intrastate.

MR. HOFF: Of course, we want to show the heavy [41] interstate balance, the flow of traffic, and we think it is relevant.

The State's bulletin theoretically runs on and on into the future. Certainly this expert's and I think he is an expert,

opinion as to what is likely to be the situation in the future is relevant, is admissible on that point.

THE COURT: There is something in your stipulation about that. Well, I will let him answer the question. I will allow him to answer the question.

I am being a little more liberal that way. You may answer the question.

THE WITNESS: Third quarter ratio is about three-quarters of one per cent of the total United traffic United handles intrastate. I would expect that that ratio would stay essentially the same in the future.

MR. HOFF: Q. All right, on a nation-wide basis, Mr. Moore, how many passengers did United handle on an average day during the third quarter of 1967?

A. In the third quarter of '67, we enplaned an average of 72,000 passengers per day.

[42] Q. Mr. Moore, how many takeoffs per day—oh, excuse me.

The average of 1,769 takeoffs per day which United makes throughout the country, how many are made from Chicago?

A. The present count is 244.

Q. Is that more than in any other city in the country?

A. It is more than any other city. It is about twice the number that we have at New York, twice the number at San Francisco, and twice the number at Los Angeles.

Q. The figure you gave was 244.

A. 234. I beg your pardon. I think that was right.

Q. Excuse me. 234.

A. 234.

Q. 234; of those 234 takeoffs per day from Chicago, how many are on through flights, Mr. Moore?

A. 171.

Q. And of the remainder, how many are on short turnarounds?

A. I believe that number is 21.

[43] Q. Will you tell us what I meant or what we mean by "short turn-around"?

A. A short turn-around is one in which the airplane arrives and in a relatively short period of time, generally in the one to two—up to three hours, and in certain exceptional cases, up to about four hours, would turn around and proceed to another destination with a different flight number.

It is not designed to carry through traffic. It is designed to come in, unload the passengers, and go out relatively soon.

Q. As opposed to a through flight which would have the same flight number, is that correct?

A. Yes.

Q. Mr. Moore, does United maintain records showing the average amount of time which its aircraft spend on the ground in Chicago between different legs of its through flights?

A. We have records like that; yes, sir.

Q. On the number of short turn-arounds, Mr. Moore, would you—you told us 21. Are you sure that is correct?

[44] A. No, as a matter of fact, I think—

MR. CAMPBELL: Objection, Your Honor. This is an attempt here by the attorney to suggest answers to the witness.

THE COURT: Read the question, please?

(Question read.)

MR. HOFF: He would like to correct that answer, maybe I should say.

THE WITNESS: The number is in the forties—

THE COURT: Wait a minute. Well, go ahead, answer the question.

THE WITNESS: I believe the number is 42.

MR. HOFF: Q. Now, we were talking about an aver-

age amount of time spent on the ground by through flights. I show you United Exhibit 9 for identification and ask you to tell us what exhibit shows.

A. By aircraft type, this shows the number of through flights and the average time by each type, and the number of short turn-around flights, and the average time on the ground on short turn-arounds.

Q. The average for through flights is what?

[45] A. In passenger, it is 45.1 minutes; in cargo, it is one hour, forty-three, and over-all, 47.

On the through flights and on the short turn-arounds, the average is just under two hours.

(The document above referred to was marked Plaintiff's Exhibit 9 for identification.)

MR. CAMPBELL: Your Honor, we would object to the questions asked of the witness on Exhibit No. 9. We don't feel that this has any bearing on the issues raised in the complaint whatsoever, about the amount of time spent on the ground of the planes.

THE COURT: Well, it may not. I think the objection is very well taken on the ground that the exhibit speaks for itself.

The objection will be sustained.

MR. HOFF: Very well.

Q. Mr. Moore, what is done to an aircraft when it is on the ground? Let us talk first about through flights.

A. On a through flight, the five major areas [46] of work would be, first, to dock the airplane; that is, to put it in the position at the gate to extend the jet-way out; off-load the passengers and cargo; service the airplane.

That would include mechanical service as necessary, a review of the outside of the airplane, a check of the logbook in the cabin, a check of the oxygen supply, a quick run-through of the cabin—picking up any newspapers or magazines that might have accumulated—straightening up of

the cabin and then the boarding of the fuel and the food, the passengers, cargo, and departure.

Q. On a short turn-around, what, if anything, in addition to the things you have just talked about is done?

A. Primarily, on a short turn-around, the added workload would involve the change of the lavoratory service, or an emptying of the tank; and on a more complete cleanup of the cabin area, and it can involve some minor mechanical work at the same time.

Q. Mr. Moore, does United make an effort to keep this ground time on both through flight and [47] short turn-around flights as shown as possible?

A. We do, particularly at O'Hare.

Q. Why is it as long as it is, Mr. Moore?

A. It is primarily to allow for the work involved that I just mentioned, plus the connecting times which are necessary to connect passengers and baggage in the connection banks that we operate.

MR. HOFF: Your Honor, I would like to offer United Exhibit No. 9, which shows these various ground times.

MR. CAMPBELL: Same objection.

THE COURT: Same objection, same ruling. Admitted.

(Said document, heretofore marked Plaintiff's Exhibit 9 for identification, was admitted in evidence.)

[48] MR. HOFF: Q. As a part of your duties in preparing United schedules, Mr. Moore, are you also concerned with the problem of the availability of aircraft at particular airports at particular times?

A. Yes, sir, we are.

Q. In general, what factors do you consider in an assignment of a particular aircraft to particular flights?

A. The principal factors would be the range capability of the aircraft and the size of the market and the limitations on facilities that we might have in an airport, and

the timing of connections, both on line and off line to facilitate the—to expedite the flow of traffic through the O'Hare facility or any other terminal facility.

Q. What is a routing chart, Mr. Moore?

A. A routing chart is a listing in one form or another showing for each day for each fleet the turn-around and the routing of the entire fleet assigned to schedule.

Q. Mr. Moore, I show you United Exhibit 10 for identification and ask you to tell us what [49] that document is.

A. This is an aircraft routing chart for our 28 727 QC aircraft as of the October 29, 1967, schedules.

On the left, we show the cities generally geographically spaced and across the time increments from midnight over to midnight the following day.

Each horizontal line on here, above which a number appears, shows the flight number of an airplane which has just arrived or is about ready to take off at the city involved, and it is drawn so as to depict the time of arrival or departure.

The diagonal line connects the two cities together between which the flight operates. As an example, in the upper left-hand corner, there is a Flight 989, which shows leaving Seattle at approximately 0155 in the morning. It flies to San Francisco. That's SFO. Seattle is SEA. It arrives at San Francisco approximately 3:20 and is on the ground at San Francisco until 4:15, and then proceeds on down to Los Angeles, LAX, and so forth.

Q. Yes. This is 28 planes for one day, is [50] that correct?

A. This is 28 airplanes for one day or in effect what one airplane does because we try to route them through the entire operation. What one airplane will do in a series of —series of 28 consecutive days.

Q. Similar charts exist or are made up for all of the aircraft operated by United on a given day, is that correct?

A. Yes, sir; yes, sir.

(The document above referred to was marked Plaintiff's Exhibit 10 for identification.)

MR. HOFF: Q. What symbol stands for O'Hare on that?

A. O'Hare appears in about the center. It is "ORD." It is outlined above and below with a red line.

Q. Mr. Moore, I have studied this before I came here. I don't attempt to have done this on the spot. But I notice that almost every one of these flights, if not every one, has been in or out of Chicago at least once on this particular day—[51] each one of these planes, I should say. And that some of them have been in and out of Chicago several times.

In that respect, is this particular routing chart typical of United's—the operation of other types of aircraft by United?

A. Yes, this is generally typical and a little easier read than some. The air—

THE COURT: This is easier to read?

THE WITNESS: Than some.

(Laughter)

THE COURT: I will wait until I see the others.

THE WITNESS: All the fleets that we operate touch Chicago, except for the Convair fleet, which is confined entirely to the West Coast and currently to the DC-861 fleet, which is quite small and confined to Honolulu-California operations. All the rest do operate through Chicago.

MR. HOFF: Your Honor, I would like to offer United Exhibit 10 for identification in evidence.

MR. CAMPBELL: Same objection, Your Honor.

THE COURT: It will be admitted.

[52] (Said document, heretofore marked Plaintiff's Exhibit 10 for identification, was admitted in evidence.)

* * *

[56] Q. First of all, Mr. Moore—let's have the first slide. I think we have covered this question.

Mr. Moore, will you tell us what—this is United Exhibit 11 for identification, by the way. [57] Will you tell us what that exhibit shows?

A. This is a geographic portrayal of all the cities that United Air Lines is certificated to serve.

(The document above referred to was marked Plaintiff's Exhibit 11 for identification.)

MR. HOFF: Q. And the next one, please? This is United Exhibit 12 for identification. Will you tell us what that shows, Mr. Moore?

A. This is the same basic format of the cities which have red circles around the dots and are those to which—to which through service is offered between Chicago and each of those cities.

(The document above referred to was marked Plaintiff's Exhibit 12 for identification.)

MR HOFF: Q. And the next one. This is United Exhibit No. 13 for identification. What does this map show?

A. This shows the lines—shows the segments and they connect the points between Chicago and the other cities here to which nonstop service is [58] provided.

(The document above referred to was marked Plaintiff's Exhibit 13 for identification.)

MR. HOFF: Q. Mr. Moore, in what way, if at all, does United arrange its service to handle the volume of connecting traffic through Chicago which you described earlier?

A. We intentionally time our flights to provide what we term a connection bank. Several times during the day, we bring a large number of airplanes in, let us say, from the East and connecting at Chicago to go west.

Our routes are predominantly east-west of Chicago. We also connect off line to and from the trunk carriers and the local service carriers.

Q. All right, now can we have the next one? This is United Exhibit 14 for identification. Mr. Moore, would you tell us what this exhibit shows?

A. The block in the middle marked "O'Hare" separates the destinations—let's say the cities east of Chicago and those west on United's route. [59] This is what we call our 1300, or 1:00 bank of flights. Those flights shown on the right, the blue lines here, represent the number of flights and where they come from. It is a litle difficult to read, but that, I believe, is South Bend (indicating), this is Fort Wayne (indicating), that's Cleveland, and so forth.

These flights come into Chicago. Some will go through. All will connect to the outbound flights going to the West to Minneapolis, St. Paul; I believe that's Milwaukee (indicating), Seattle, Portland (indicating), and so forth. Each line represents one flight.

Q. The connections are possible from every incoming flight to every outgoing flight in this particular bank?

A. Yes, that's right.

(The document above referred to was marked Plaintiff's Exhibit 14 for identification.)

THE COURT: What is the significance of the double line to Los Angeles?

THE WITNESS: We happen to have, Your Honor, [60] so much traffic that one airplane will not carry it; so in that bank, we have two flights.

THE COURT: Like the old "Twentieth Century" used to carry two trains?

THE WITNESS: Yes. Some day, we hope to get a larger airplane.

MR. HOFF: Q. This is what you call your 1300 bank?

A. Yes.

Q. There are other banks during the day?

A. Yes, there are several other banks during the day, both eastbound and westbound.

Q. All right, can we see the next one, which is United Exhibit 15 for identification? Does this relate to the same connecting bank, Mr. Moore?

A. It does. It is the same bank; in blue again are the United flights in and out, and in the darker color are the other trunk flights outbound from Chicago.

For example, there is a flight to Great Falls and Billings, there is another flight to Minneapolis-St. Paul, there are two other flights to Los Angeles, there are two flights to [61] San Francisco, and so forth.

Q. Again, are connections possible from all of the incoming flights shown on that map to all of the outgoing flights?

A. Yes, these are only those to which connections are made within one hour time.

Q. One of your westbound flights seems to swing back south and east, Mr. Moore.

A. Well—

Q. What is the explanation for that?

A. That is shown—that is down to Atlanta and into the Florida area, and that is shown because there is some traffic that backhauls, or, let us say, goes slightly west first in order to go south. For example, from Flint and Saginaw up in Michigan, from Lansing to Muskegon, from South Bend to Fort Wayne, there is traffic that flows into Chicago-O'Hare and then connects to Atlanta, Jacksonville, and Miami.

Q. For that traffic, Chicago happens to be the most convenient connecting point, is that correct?

A. That's right, that's right.

[62] (The document above referred to was marked Plaintiff's Exhibit 15 for identification.)

MR. HOFF: Q. Now, can we see the next one? Now, again, the same connecting bank, this whole series is the same connecting bank; is that correct?

A. Yes, sir, that is correct.

Q. Tell us what this one shows.

A. It is the 1:00 p.m. bank and here again we have shown only United flights coming in, going out. We show here, in addition to United in blue and the trunk carriers in the darker color, we depict here in red connections to the local service carriers at O'Hare. Again, all the flights coming in will connect to all these going out.

(The document above referred to was marked Plaintiff's Exhibit 16 for identification.)

MR. HOFF: Q. Next one, and this one is?

A. This is somewhat the reverse of the second one of this type (indicating). This shows only United outgoing, but it shows the blue lines of United incoming to Chicago and in the darker lines, [63] the trunk carriers in addition to United between passengers in and cargo in for connection. Here again, all the inbound flights connect all outbound flights.

(The document above referred to was marked Plaintiff's Exhibit 17 for identification.)

MR. HOFF: Q. All right.

A. This one tends to include the local service carriers coming into the O'Hare 1:00 p.m. westbound bank showing United in blue, other trunks dark, local service in the red color connecting only to the United flights west.

(The document above referred to was marked Plaintiff's Exhibit 18 for identification.)

MR. HOFF: Q. Now, this series of five exhibits, or five slides, if I understand it correctly, shows only connections which are possibly either from or to United in this particular connecting bank, is that correct?

A. That's correct.

Q. Or other combinations of connections [64] possible?

A. Oh, yes. The carrier—or a passenger could come in on another trunk carrier to O'Hare at essentially the same time of day and connect with one of the local service carriers on another trunk.

MR. HOFF: All right, Your Honor—

Q. Well, one more thing, Mr. Moore. I now show you United Exhibit No. 19 for identification and I ask you if you would please state—

MR. CAMPBELL: Your Honor, pardon me. I don't know whether you have ruled. I object to this.

MR. HOFF: I am going to offer copies of all these exhibits, including the one that I am now showing him.

(The document above referred to was marked Plaintiff's Exhibit 19 for identification.)

• • •

[66] Q. Mr. Moore, you have before you now United Exhibit 19 for identification; would you tell us what that is?

A. We had talked about connecting banks. What this does is list the five major eastbound banks and five major westbound banks.

(The document above referred to was marked Plaintiff's Exhibit 19 for identification.)

MR. HOFF: I didn't give you one of these. I'm sorry. (Addressing Mr. Campbell.)

THE WITNESS: In the right-hand column is a calculation of the number of cross connection possibilities. These are from one flight to another flight, the number of connecting possibilities available to the traveling public in each of these ten different banks.

MR. HOFF: Well, if the Court please, I would [67] like to offer at this time, and I understand that you are reserving ruling on the photographs which correspond to the slides, I would like at this time to offer United Exhibit—formally offer United Exhibits 11 through 19 for identification. They are all connected to this connecting bank.

MR. CAMPBELL: We renew the objection as just stated.

THE COURT: For whatever bearing it may have on the third point . . . this is a violation of the Federal Constitution of the Commerce Clause . . . it may have some bearing on it. I don't know.

But again perhaps for whatever bearing it may have, I am going to admit them in evidence.

(Said documents, heretofore marked Plaintiff's Exhibit 11 through 19 for identification, were admitted in evidence.)

[68] MR. HOFF: We will sort these out, Your Honor, and distribute copies of them.

THE COURT: All right.

MR. HOFF: Q. Mr. Moore, in setting up these connecting banks, does United cooperate with other airlines?

A. We cooperate very closely in setting up of the banks and in setting down the connections themselves. The whole industry has to maintain a very interdependent attitude here.

Q. In that respect, are the schedules of other airlines and in particular of the local service airlines dependent on United's schedules?

A. Yes, sir.

Q. And quite apart from the convenience of the connecting—these connecting banks and making connections, to what extent are other airlines, whether trunk or local service, dependent on United?

A. I think we are all interdependent upon each other whether we have connection banks or individual flights which connect.

In order to expedite the flow of traffic through O'Hare Airport and to utilize the facility [69] as efficiently as possible, it is incumbent upon the entire industry—United and all the other carriers—to work together, and we depend upon, to a certain extent, upon their timing, and they depend to an even greater extent upon our timing.

Q. Are United's own operations in other parts of the country dependent on or controlled by its operations in Chicago?

A. They are. Chicago is the keystone in the—in our arch of planning.

Q. Could you give us a few examples of what you mean?

A. The timing is one example, the timing across the Los Angeles-San Diego segment to the extent that it relies or is part of a Chicago-Los Angeles-San Diego through service would be dependent upon the time of the connection back at Chicago.

Another example is the—a specific example, we have a flight at 5:00 p.m. out of Chicago to Denver—

MR. CAMPBELL: Your Honor, we will stipulate that other airlines are dependent upon United Air [70] Lines.

MR. HOFF: I think he is almost through with his answer. Maybe he was—

THE COURT: Naturally, I would like to hear about this one about Denver.

THE WITNESS: We have a flight at 5:00 p.m. from Chicago to Denver, which proceeds on through to Reno and Sacramento, and provides through service to those points, and it provides Chicago-Denver service at 5:00 p.m.

THE COURT: Off the record.

(Discussion had off record.)

THE COURT: We will take a short recess.

(Short recess.)

THE COURT: You may proceed.

MR. HOFF: Q. Mr. Moore, are all of United's flights which pass through Chicago fueled while they are in Chicago?

A. Practically all would be fueled here.

Q. When does fuel—in the case of through flights—when does fueling take place?

A. Well, there is very little time for slack on either side. Fueling takes place shortly after [71] arrival and shortly

before departure. As a rule, it depends upon when the fuelers and the equipment is available, but usually it is just shortly before takeoff.

Q. And on short turn-arounds, when is the fueling permitted?

A. Essentially the same.

Q. Mr. Moore, as far as the basic operational facts to which you have testified are concerned, do you foresee any change in the pattern and volume of United's operations in the future?

A. Only growth.

MR. HOFF: That is all for this witness, Your Honor.

THE COURT: Cross examination?

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[75] JOHN G. ARTUS

was called as a witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HOFF:

Q. Will you state your name, please?

A. My name is John G. Artus.

THE COURT: Spell your last name.

THE WITNESS: A-r-t-u-s.

MR. HOFF: Q. And your business, Mr. Artus? Do you have a title?

A. I am a flight manager and check pilot for United Air Lines.

Q. You are referred to as "Captain," I think.

A. Yes.

Q. Where do you live, Captain Artus?

A. I live at 820 Country Drive, Barrington.

Q. By whom are you employed?

A. United Air Lines.

Q. And your present title again?

A. Flight manager.

Q. As flight manager, Captain Artus, what are your responsibilities?

[76] A. Well, I have sixty some pilots assigned to me, and I have direct supervision over them to check them periodically as to their proficiency and see to their route qualifications and generally supervise their entire activity.

Q. Do you fly?

A. Yes.

Q. As flight manager, do you fly?

A. Yes, I do.

Q. To what extent?

A. Well, I am at the controls myself approximately 25 hours a month and fifty to sixty hours a month, I am in the cockpit as check pilot.

Q. How long have you been a flight manager for United?

A. About a year and a half.

Q. Prior to that, how long had you been a pilot?

A. Well, I started flying in 1939.

Q. Will you briefly tell us the history of your career as a pilot?

A. Yes. I started flying in 1939 and when my experience level was at the point that I could [77] apply with an airline, I applied for a job as first officer, or a co-pilot, with Pennsylvania Central Airlines, which later became known as Capitol Airlines and subsequently merged with United Air Lines in 1961.

Q. Your present flying is out of and back into O'Hare, is that correct?

A. That's correct.

Q. Prior to that, have you also flown in and out of O'Hare?

A. Yes, I have flown in and out of O'Hare as long as it has been in existence.

Q. Were you stationed—you have been stationed at Chicago, so to speak, for how long?

A. Four and a half years.

Q. Captain Artus, are you familiar with the air traffic control function of the Federal Aviation Agency?

A. Yes, I am.

Q. Would you describe that function, please?

A. Well, the air traffic control system—

MR. CAMPBELL: We object, Your Honor, to this line of conversation as to the—I assume that the [78] F.A.A., Federal Aviation—

THE WITNESS: Agency.

• • •

[79] MR. HOFF: Q. Go ahead, Captain Artus.

A. Well, the air route traffic control system is a department of the Federal Aviation Agency and its prime responsibility is the separation of aircraft operating on a time flight rule condition. And to do this, their basic working tool is a system [80] of radar, in which aircraft are identified and tracked by a controller at a radarscope much like a TV screen. And he follows the blip across this screen. And as a result, he knows absolutely where the aircraft is and what route it is traversing.

Q. Would you describe how this works in the case of a particular flight beginning at the point of takeoff and carrying it through to the borders of Illinois?

A. Well, every flight that departs O'Hare on an instrument flight rule clearance files a flight plan for the particular route, and these routes are laid down, as you might say, highways in the sky. They are specified routes that are eight miles wide that we have to follow.

When a flight departs here, he is vectored or given a heading to one of these routes that he would select. To do this, he is given a heading to fly, after takeoff at O'Hare, and if I could use the case of a westbound flight, taking off

on Runway 27, which is heading—270 degrees heading to the west, the controller will tell him [81] to maintain a heading of 270 degrees after takeoff.

From that point, he changes his radio frequency to what we call departure control and this is the first man in this radar network that handles him, and he is located right at O'Hare Field. And he continues him on these vectors until he gets to his specified airway. He is "at and off," as we say to the air route controller by the time—by the time that he is fifteen or twenty miles west of O'Hare, and then this function is taken over by the air route traffic controller who is located in Aurora, Illinois, and he continues him from that point.

Q. You mentioned instrument flight rules. Are all United's flights flown under instrument flight rules?

A. Yes, it is under policy to fly all flights on instrument flight rule condition, and as a result, we are under the positive control of these radar operators.

Q. By means of this system, are aircraft assigned to particular departure routes as they depart from O'Hare Field?

[82] A. Yes, they are.

Q. You referred to flight plans, Captain Artus. Would you tell us what a flight plan is, and would you tell us if there is more than one type, and would you describe them, please?

A. Well, a flight plan is information needed and required by the air traffic control system, and it has to be filed prior to departure; so that the aircraft can be given a clearance and in a flight plan is specified the route of flight, the altitude to be flown, the true air speed, the time of the flight, and various other information items that pertain to technical equipment on the airplane.

And when this is filed, it is accepted by the air traffic control system.

Q. Is it always accepted? Let me interrupt for just this one question.

A. Yes, it is always accepted, and there could be some delays incurred in being able to allow this flight on this airway at that particular time because of conflicting traffic.

Q. All right. Is there any difference between short range and long range flights as far [83] as flight plans are concerned?

A. Well, short range flights are what we consider anything under 1,200 nautical miles and we have—now we have a system which we call Center Stored Flight Plan. These pertain to flights that operate day in and day out the same flight number, and so on. And we store these flight plans in the Center, in the computer in the air traffic control center, and these have a standard routing, and a standard time enroute, a standard altitude, and it is used day in and day out, and always over the same route.

On long range flights, more that 1,200 nautical miles, there is a choice of various routes mainly due to operational factors—such as weather on one particular route, or strong headwinds on another—that you may select one or the other route rather than the primary.

Q. How often does the pilot on short range flights—how often does the pilot follow the Center Stored Plan?

A. All of the time with the exception of weather; he might want to deviate from it in that [84] case.

Q. As a result of the system which you have described, Captain Artus, can United determine geographically where its aircraft fly over the State of Illinois when departing from O'Hare Field going to a specific direction?

A. Yes, they can.

MR. HOFF: We have one more slide, Your Honor.

MR. CAMPBELL: We enter our objection again, Your Honor, unless counsel can indicate to the Court what the basis of the slides are.

MR. HOFF: Oh, excuse me. This is going to be the map of Illinois which will show the departure routes which this witness has been testifying to.

It is going to contain certain other information which will be verified and authenticated by the third witness, which we are offering as a part of our direct case, Mr. Titus, who is sitting here in the back of the courtroom.

MR. CAMPBELL: I think certainly the Court can take judicial knowledge of the exhibits that are already into evidence and certainly the Court takes judicial knowledge of the State of Illinois [85] and the location of O'Hare Field.

MR HOFF: These are going to show routes through Illinois.

THE COURT: Well, this is primarily nation-wide, the other exhibits that I have.

MR. CAMPBELL: We will again offer to stipulate that the plaintiff flies out of O'Hare, Your Honor, in various directions and on various flight plans.

THE COURT: And I am interested in what the various directions are.

MR. HOFF: Exactly, Your Honor.

THE COURT: Very well.

What exhibit number is this? 20?

(The document above referred to was marked Plaintiff's Exhibit 20 for identification.)

MR. HOFF: Q. Captain Artus, this map, as you notice, shows the State of Illinois. Have you checked—the red lines shown on this map, are those the departure routes which you have been testifying about?

A. Yes, they are.

[86] Q. Have you checked the accuracy of those departure routes as shown on this map?

A. Yes, I have.

Q. Could you identify some of the Center Stored short-range routes that you have testified to?

A. Yes. For instance, if I can point out Route M, I believe it is here, this is a Center Stored short-range route to Denver, which is basically what we call a radar vector to Des Moines, Iowa, and from that point, you pick up the number of the jet airway that runs from that point to Denver.

Now, this is true of every one of those routes shown, that these are all radar vectors to a particular airway.

Q. Could you point out one of the long-range routes?

A. Yes, this dashed line shows a long-range route to Los Angeles.

Q. Why is that route dashed, Captain Artus, or as shown by a dashed line?

A. It is very rarely used. We have it in [87] our computer, stored in our own computer as a safety valve, let us say, because of weather; you might have a squall line up to the northwest or to the west, and it might be all clear to the southwest. So the pilot would elect to fly this route rather than one of the primary routes.

Q. Are those all of the routes you testified about?

A. Yes.

Q. Is there any possibility that a pilot might use one of the routes—excuse me—a route which is not shown on this map?

A. No. He has to take a radar vector to one of the established jet routes.

Q. Okay. That's all on that.

We are not offering that exhibit at this time, Your Honor. There is some other material on there that will offered by another witness, as I have indicated.

You have indicated that while using one of these vectored routes out of O'Hare and the aircraft is under the positive control of the Federal Aviation Agency personnel. Does this raise [88] the possibility that while following one of these established departure routes, aircraft control would

instruct the pilot to depart from that route in some respect?

A. Yes, they quite often, because of the conflict with traffic, they will assign a different radar vector other than the standard.

Q. Could you in terms of specific headings, could you give us an example of such a change?

A. Well, the standard radar vector to Des Moines is 270 degree heading, and because of inbound conflict with traffic, they may assign you to a 260 heading, or possibly a 280 heading.

But after the conflicts have been relieved, they would either vector you back to the original track or a parallel track.

Q. How much additional mileage inside the borders of Illinois would such a change in heading normally add?

A. This would add one mile to the difference between a 260 and a 270 heading.

Q. In the example you have given?

A. Yes.

[89] Q. One mile?

A. One mile.

Q. What would an extreme case be in terms of additional mileage within the State of Illinois as occasioned by one of these changes?

A. I would say the extreme limit would be perhaps five miles.

Q. Captain Artus, are there standard procedures under which United's aircraft are flown?

A. Yes.

Q. In a very general way, what do these procedures cover?

A. Well, we calculate the standard operating procedure, which is laid down in our approved flight plan manual, and this flight manual is our bible. It has every bit of informa-

tion that we need to operate the airplane in a safe manner and an economical manner.

Q. Do these procedures or flight manuals specify the power settings to be used by the pilot during various phases of the flight?

A. Yes, they do.

Q. When we say "phases of flight," in general, [90] what phases are we referring to?

A. Takeof, climb, cruise, and descent.

Q. Must these procedures, as set forth in these flight manuals, be followed by the pilots?

A. This is what we check them for and we require that they do follow the standard operating procedure.

The captain always has the right to exercise his emergency authority and depart from some established procedure if he feels it is the safest course of action.

Q. What would be the effect on fuel consumption if the pilot were to deviate in one of the respects that you have just testified to?

A. Well, as far as the fuel, the fuel would remain—the fuel flow consumption would remain fairly constant. What I am speaking of is a deviation because of a conflict with another airplane that was not pointed out to him—something that popped up.

Does this answer your question?

Q. I think to my satisfaction anyway.

Captain Artus, are you familiar with the [91] stipulation that was entered into with the State in which it describes the aircraft departure routing system in effect from 1960 to approximately 1964?

A. Yes.

Q. Are you familiar with that stipulation?

A. Yes.

Q. Have there been any substantial changes in that aircraft departure routing system since that time?

A. No, there have not.

Q. Do you anticipate that there will be any material change in that departure routing system within the foreseeable future?

A. To my knowledge, I don't anticipate any.

Q. On what do you base that opinion?

A. I beg your pardon?

Q. On what do you base that opinion?

A. Well, the radar system is a proven system and it is basic to the operation of the entire air traffic control. And so I say to the best of my knowledge, it could be in the future—unless in the distant future they come up with some more [92] economical system, but we have the radar system and it is firmly established, and I know we are going to stick with it. So I don't anticipate any changes.

Q. United is beginning to operate more flights out of Midway, Captain Artus. Will the basic pattern of operations out of Midway be the same as at O'Hare?

A. Yes, it will.

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[93] F. E. TITUS

was called as a witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Doyle:

• • •

[101] MR. DOYLE: Q. Now, Captain Artus testified as to the standard procedures under which United flights are operated, and he mentioned that they appear in a flight manual.

Are you familiar with the flight manuals promulgated by United?

A. Yes, I am.

Q. And by whom are the—maybe I should say it another way.

What department of United has responsibility for promulgated flight manuals?

A. The flight operations department.

Q. And the standard operating procedures mentioned by Captain Artus, by whom are those prepared?

A. The standard operating procedures have part of their origin from the Federal Aviation Agency. Certain procedures are mandatory. These procedures are supplemented with so-called company procedures and the total procedures are contained in this flight manual.

MR. CAMPBELL: Your Honor, again we—I don't wish to interrupt, but we must renew our objections [102] to this line of questioning and answers as intending to duplicate what the last witness testified to, and again we find ourselves involved in the flight plans again.

THE COURT: There would seem to be some duplication here. I think, however, this witness' testimony is in some ways explanatory of the previous witness, Artus.

MR. DOYLE: I might add, Your Honor, that we are merely laying a predicate to introduce the flight manual as an exhibit, and to that extent, we are somewhat duplicative, but I am done with it. I am ready to put the exhibit in.

THE COURT: All right.

MR. DOYLE: Q. These flight manuals are promulgated in written form, are they not, Mr. Titus?

A. Yes, they are.

Q. I now hand you United Exhibit No. 22 for identification. Would you please explain what this is?

A. This is the airplane flight manual for the Boeing 727 type aircraft operated by United and the flight manual is in two volumes.

[103] Q. Are these manuels approved by any governmental agency?

A. Yes, they are approved by the F.A.A.

(The document above referred to was marked Plaintiff's Exhibit 22 for identification.)

MR. DOYLE: Q. I now show you United Exhibit 23 for identification. Will you explain what this is?

A. This is merely the letter granting the approval to the company airplane flight manual from the Federal Aviation Agency.

(The document above referred to was marked Plaintiff's Exhibit 23 for identification.)

MR. DOYLE: Your Honor, at this time, I move that United's Exhibits 20, 21, and 22 be received into evidence

MR. CAMPBELL: We would object, Your Honor, as the same have no bearing on the issues again raised in the pleadings in this case.

MR. DOYLE: Your Honor, I would like to speak—

THE COURT: Well, I will overrule it, Mr. Campbell. It may have some bearing on this. [104] I'm not sure, and I am going to admit them. If they have no bearing, then the Court will—

MR. CAMPBELL: We didn't get a copy of these. Is there a copy for—have you given us copies of all the other exhibits?

MR. DOYLE: I'm sorry. Those are about $425 each.

MR. CAMPBELL: We have not had an opportunity to examine these—

THE COURT: I will give you all the time you wish.

MR. CAMPBELL: —these documents, Your Honor, and prior to their being introduced into evidence, we would certainly want—

THE COURT: I will withhold my ruling until you have had an opportunity to examine them.

MR. DOYLE: Our Exhibits 20 and 23 are then in?

THE COURT: I think I am going to admit your Exhibit No. 20. I can see that may have some materiality.

(Said document, heretofore marked Plaintiff's Exhibit 20 for identification, was admitted in evidence.)

[105] THE COURT: I will withhold ruling until counsel has had a chance to examine them since he hasn't seen them.

MR. DOYLE: Q. Now, are there similar manuals to the one you identified with respect to the Boeing 727 for each of the types of aircraft flown by United?

A. Yes, there are.

Q. And are each of these manuals approved by the Federal Aviation Agency?

A. Yes, they are.

Q. Do these manuals include fuel consumption figures for the specific type of aircraft covered?

A. Yes, they do.

Q. On what are these fuel consumption figures based?

A. The original figures are provided by the manufacturer when we first get an airplane from him, and they are constantly audited by United Air Lines as the experience is acquired with the airplane and revised where and whenever necessary.

Q. And are fuel consumption figures given for each power setting on which the aircraft may [106] be operated?

A. Yes, they are.

Q. By referring to the standard operating procedures contained in the flight manuals and the fuel consumption tables developed for each type of aircraft, it is possible to determine how much fuel a specific type of aircraft will use departing from a specific airport when it travels a distance that is known?

A. Yes.

Q. How would this be done?

A. This would be done by taking the various phases of flight, takeoff, climb, and cruise, and determining the amount of fuel burned in each case and totaling the amount.

Q. Would it also be necessary to make an allowance for fuel on the ground?

A. Yes, for taxiing.

Q. Does United have current studies of its taxiing at O'Hare Field?

A. Yes, they do. United is constantly monitoring taxi times not only at O'Hare, but the entire [107] system, since this is an important ingredient of the flight schedules that we publish.

Q. Knowing the taxi time, is it possible to determine the amount of fuel that an aircraft will consume during the taxi portion?

A. Yes, it is.

Q. Mr. Titus, I show you United's Exhibit No. 24 for identification. Would you explain what this is?

A. This is a compilation of the fuel that would be burned out by each type of aircraft operated by United in going from O'Hare Field to the Illinois border over the various routes that have been indicated on the chart that has been displayed.

(The document above referred to was marked Plaintiff's Exhibit 24 for identification.)

MR. DOYLE: Q. Do these calculations assume if standard operating procedures were followed on the part of United's pilots?

A. Yes, they do.

Q. What would be the effect if there were [108] permissible deviations from these standard procedures?

A. The effect would be negligible.

Q. In other words, your calculations assume more rather than less fuel would be used?

A. Yes.

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[126] MR. CAMPBELL: The second motion, Your Honor, is a motion which was served upon the attorneys for United Air Lines this morning at 10:45; and I would just like to comment to the court the reasons for this motion.

This motion directs the plaintiff, United Air Lines, to produce for examination before this court a witness or an agent who is familiar with the matters alleged in the amended complaint.

THE COURT: And out of the county?

MR. CAMPBELL: I beg your pardon?

THE COURT: And out of the county? I think the rule says out of the county, doesn't it?

[127] MR. CAMPBELL: No, Your Honor, this is rule two—

THE COURT: Let's read it and see.

MR. CAMPBELL: 237.

THE COURT: Read it.

MR. CAMPBELL: All right, I have it here.

THE COURT: Maybe I am confused—

MR. HOFF: We have no objection as to the form—

THE COURT: But I haven't seen it in some time.

MR. CAMPBELL: I will show it to Your Honor, Rule 237. There is no time limitation contained in the rule.

THE COURT: "If at the time the notice is served the party or person is a non-resident of the county, the court may order any terms and conditions in connection with his appearance at the trial and that are just, including payment of his reasonable expenses."

MR. CAMPBELL: Yes, and United Air Lines is authorized to do business in the state—

THE COURT: The rule says if at the time the notice is served the party or person is not a [128] resident of the county—it is my recollection that this was in the rule—the court may order—in other words, the theory, of course,

being if he is in the county he can be served with a summons or subpoena. That is the last sentence in that rule.

MR. CAMPBELL: I wanted to apprise the court the reason this motion was served.

THE COURT: Well, we are talking about another—maybe they will produce him anyway?

MR. BERENS: We have no objection as to the form, although we are somewhat curious as to its purpose.

MR. CAMPBELL: We wanted to explain—

THE COURT: Well, of course, the purpose at this point is no concern of mine.

MR. BERENS: Yes.

MR. CAMPBELL: We wanted to explain the basis for this motion, Your Honor. It became apparent yesterday from the witnesses who testified that perhaps the plaintiff here would not call a witness who could be examined by this court relating to the sale or purchase of the fuel which arrives in East Chicago and Hammond, Indiana, and transported [129] to DesPlaines and then to O'Hare Field. We feel that the basis of this lawsuit—

THE COURT: Excuse me. I don't interrupt very often, but this will be the last one, I assure you, it is a long distance call that I placed.

(Short interruption.)

MR. CAMPBELL: As I was stating, Your Honor, it became apparent yesterday that we didn't feel that the plaintiff would call in a witness who would testify as to the matters relating to the purchase and sale of this fuel and to testify about the transportation of this fuel, the storage of this fuel at DesPlaines and the subsequent delivery of this fuel to O'Hare Field.

We felt that it was necessary—since this is a tax exemption suit that the plaintiffs here are seeking, a complete exemption of the use tax involved here, and the complaint

also states that it is a class action, we felt that in order to aid the court that it would be necessary to have all of the facts before the court in order to pass on this question. We felt that perhaps the plaintiff was not going to produce such a witness, and that is the reason for this motion.

[130] THE COURT: Is there any objection to the—you don't want them all, I take it?

MR. CAMPBELL: One witness; one witness who can testify as to the matters in the complaint and the paragraphs that we have referred to in the stipulation. In conversation and conferences with counsel, and a deposition, we find that perhaps the facts may be different from the stipulation paragraphs.

THE COURT: We commented on this yesterday, five, six, seven and eight.

MR. CAMPBELL: Yes, and we feel in order to be fair to the court and fair to the taxpayers, since this does involve revenue—

THE COURT: And fair to the state.

MR. CAMPBELL: I beg your pardon?

THE COURT: And fair to the state.

MR. CAMPBELL: Yes; and since it does involve revenue, that it would be in the best interest of all of the parties to have a witness here to testify to these matters—

THE COURT: How about it?

MR. CAMPBELL: —and to be examined.

MR. BERENS: Your Honor, we will object to [131] producing a witness on any questions or facts that tend to contradict the specific terms of the Stipulation. Now, I have to make my position very clear here. Yesterday we introduced evidence over objection of counsel, which we said supplemented the original stipulation.

THE COURT: That's right.

MR. BERENS: We also used the phrase that it updated —although we didn't mention this yesterday, we can point

out certain updated information that we voluntarily entered yesterday that was adverse to our case. The facts on some of the fuel consumption had slightly deteriorated in terms of our contention that the fuel is wholly burned outside of Illinois.

We think that the effort of the state here is quite a different question. It is attempting to specifically contradict paragraph 4 of the stipulation—excuse me.

THE COURT: May I have my file. I think I took that file inside, didn't I. See if you can find it.

MR. CAMPBELL: Here is a copy of the stipulation, Your Honor.

THE COURT: All right. You are talking now [132] about paragraph 4?

MR. BERENS: I misstated, Your Honor; paragraph six.

THE COURT: Yes.

MR. BERENS: Which reads in part that all of the fuel purchased by United from Shell Oil Company is delivered to United with possession, title and all risk of loss passing to United either at Hammond, Indiana or East Chicago, Indiana.

Now, counsel yesterday pointed out several times in his objections on how hard we strived to get this stipulation, and he is quite right. We remember working for months on and off with the department and with the Attorney General's office in getting this stipulation.

At the time of the negotiations, as in all stipulations, there were areas which were being highly negotiated as to phraseology so that neither one side or the other would get an advantage. This stipulation was a good deal more narrow than what we had proposed originally as fair to both sides.

We had to make these concessions in various areas, but we did not make any concession, I don't believe, in the area of paragraph six, that [133] is, where delivery, risk of loss, title and possession had been made.

One of the express conditions of the state as to entering into this stipulation was the withdrawal of two interlocutory appeals we had taken on the earlier order of the court. And I would like to go back a little bit on this, because Judge Brothers handled that. We came in originally asking for relief both for the past and the so-called current period on the general equity jurisdiction of this court, not under the protest fund act. It was our contention that this was so clearly a misapplication of the law that equity should act to prevent anything from being collected, even in a protest fund.

Judge Brothers agreed with us as to the past period; he did not agree with us as to the current period.

THE COURT: You mean the period prior to July 1, '63 or—

MR. BERENS: Yes, for that we got the temporary injunction. For the period from that date, he was only willing to grant a protest fund injunction. This, of course, is a matter of discretion of the [134] trial judge.

On our research of the law at the time, it was—particularly the Baumgartner case and a few others in that area, we thought he had made a mistake and had abused his discretion in not allowing equity jurisdiction, particularly when United was willing to put up a very considerable bond to avoid paying this large sum of money during the pendency of this litigation into the protest fund.

We had to take two interlocutory appeals because of the confusion in the Illinois rules as to where an interlocutory appeal on a revenue matter goes. So we had dual appeals pending in the Appellate and Supreme Court for several months during which we were negotiating this stipulation. The stipulation was entered into on the 16th of January of '66; it was filed the 19th of January in this court, and pursuant to our agreement with the state we withdrew both appeals on the interlocutory issues on February 1st of that same year.

In the meantime, because of the withdrawal of that appeal and our assumption that the Appellate or the Supreme Court would have ordered [135] a reconsideration of this court of its original ruling not to grant a general equity injunction, United has paid a very substantial sum of money into this protest fund at a time, incidentally, when they are trying to refinance very considerable expenditures in jet aircraft and other facilities.

As we read the Illinois law, and which I have a memorandum here, Your Honor, if you should like to see it, a stipulation entered into between the parties is considered from two viewpoints: One, in the nature of a contract between them where one is making concessions in exchange for other concessions. The other viewpoint that the law has is that this is a means of facilitating the judicial process; and if we can get some things out of the way by stipulation, they will remain out of the way during the litigation.

There are three exceptions to this rule, one is fraud, which is self-evident; two is a mutual mistake of fact, or material fact; and the third which is, from what we can tell from our research, used very sparingly, is that there has been a change of fact since the stipulation which justice would require that the parties be relieved, [136] or one of them be relieved, of the burden of the stipulation.

Now, in counsel's opening presentation, he did not imply or assert fraud; I don't believe he was implying or asserting mutual mistake.

Now, let us look to the question of change. Shortly after, or shortly before the bulletin, and I am not sure on the facts on this, United was audited very thoroughly by one or more auditors of the Department of Revenue. They went very carefully into this area of where United was purchasing the fuel and where it was delivering it. These auditors did not set up—so far as we know, because we received no proposed assessment, on the basis that this was delivery

in Illinois and therefore very obviously taxable. Similarly Shell Oil Company, who is our supplier has been audited up through the year 1965, and at no time did any auditor assert that they were subject to the retailers' occupation tax for having delivered this fuel or sold it to us in Illinois.

At the time the stipulation was being negotiated we repeatedly offered to Mr. Campbell's predecessor, Mr. Dore, and I think during the latter [137] period to Mr. Campbell and to John Gaughan, who was with the Department of Revenue at that time, invited them to check with us these facts.

We said "We are trying to get a fair stipulation, one that will be helpful and one that naturally will be as good as it can be for our client's position, but we want you to be sure that we are not over-reaching here."

This offer must have been made in a half dozen conferences. They did not take up the offer at that time, indicating, I would say, that their audit was adequate and that they felt we were people that they could rely on.

Last summer, a year and a half after the stipulation was entered into, I believe it was Mr. Bromberg, who initially contacted one of my partners and said "We would like to go into the delivery question."

And I interpose here, Your Honor, we are not going to claim surprise on this, because this would be an unfair assertion on our part. We discussed this with the client, who was reluctant to go through a reaudit and take up the time of people going over stuff that they thought had been [138] gone over once before very thoroughly. We insisted to the client that first of all that the state has the right to audit and that to go over it a second time would not be a basis of an objection to this, and that they should make this available.

The client made one or more accounting personnel available on a continuous basis to the auditor. We had Mr.

Doyle with the auditor for I believe several days—was it? going through every thing and anything he wanted as to the then recent period of '67 and '66, and also on a selected basis whatever he wanted on the past period.

This included, so far as I know, the following documents: The fuel contracts between Shell and United and all of the amendments reaching from 1953 on; the lease agreement between Shell and United and some amendments—seven amendments to it.

THE COURT: What was leased?

MR. BERENS: Some facilities at O'Hare Field.

(Continuing)—the invoices from Shell to United; the payment records from United to Shell of these invoices; the delivery receipts from Shell to West Shore Pipeline in Indiana showing the quantities delivered; the orders from United to [139] Shell for the different shipments and the similar orders by United to West Shore for arranging the shipping on the common carrier line. We tried in all of these documents for the auditor to his satisfaction, we thought, showing that there was no delivery, but more importantly in the context of this argument, that there was no change during this whole period, and in particular, no change since the stipulation had been entered into.

We think that the state initially had—had full access to these records; we offered at the time of the stipulation to make anything available to them. We have since, without any attempt to harass or inhibit them before this court, let them reaudit the documents. We have made everything available at length to them, and we think that if a stipulation should be binding under these circumstances, where all the facts were made available at all times to them, where we gave up an interlocutory appeal at an economic cost to ourselves at the express request of the state to enter into the stipulation, that the stipulation should stand, and I would like to make a couple of concluding comments.

I am in the position of implying that [140] there is something wrong with the delivery situation, possibly; we do not think this. We think this is an extremely remote possibility. In fact, I might characterize it from what we can see, this theory is frivolous, but nonetheless, this is a risk and—at least a theoretical risk.

Now, let's assume that there is something wrong with the delivery for the moment, as an assumption. For two years since the stipulation, or for four years since the first proposed assessments, we would have been able to do something about it and correct it, so that we would not be exposed to any liability on the R.O.T. issue at this time; but on the contrary, we have been relying, first of all, on the inaction of the state in proposing any assesament on this basis, but more pertinently, on their specific stipulation with us for a consideration that delivery—the facts of delivery were not part of this issue.

Now, if the court would admit this evidence and we would be subjected to liability, we will have two years of reliance, almost to a point of entrapment—although I don't like to use that extreme term.

[141] We also have another problem with this. If this is an R.O.T. assertion or the equivalent to it, a use base tax based on delivery, the statute of limitations of three years, reaching back to July 1, '63, should have expired on a good portion of the earlier term of this. This statute has been tolled by the pendency of this litigation under the usual rule; however, we will have the strange effect of the statute being tolled as to the R.O.T. issue, because we have a litigation on an entirely different question, whether loading fuel aboard aircrafts is a taxable use. And for that reason, we think that it would be unfair and unjust to our client to permit the state to contradict what they stipulated to us —with us, as to this delivery.

MR. CAMPBELL: Counsel assumes the state wants to contradict, Your Honor. I think counsel used the expression yesterday "to put some flesh on the stipulation," on which they consumed an entire afternoon. Counsel also—I don't know anything, personally, about the dismissal of the interlocutory appeals that was based upon this stipulation. I know nothing about this personally. But in any event, the tax liability here arises by virtue of [142] the statute. So that insofar as the reliance of the plaintiff here, he is no different than any other taxpayer. Now, the plaintiff drew the stipulation, The plaintiffs prepared the stipulation. The state officials executed the stipulation. The plaintiffs were more familiar, of course, with the facts of their own operations than were the officials of the state.

We feel that—again, to be fair to the court, that all of the facts should be before the court, since they are seeking an exemption based upon certain facts.

Now, from counsel's remarks, they are unwilling to produce these witnesses to be examined to see whether the stipulation as entered into is true or whether it is untrue.

In January, 1966, we entered into the stipulation. I think about three weeks ago, at counsel's office, at the time of a deposition involving the Shell Oil Company, one of the defendants in this case, it developed that the fuel upon arriving in East Chicago and in Hammond is transported by way of the West Shore Pipeline, in which one of the defendants or both have an interest. [143] It also developed that the storage facilities in Des Plaines, Illinois, are owned by one of the defendants here, Shell Oil Company. It also developed that there is a Lockeed, I think, Terminal Air, Inc. that also one of the defendants has an interest in, transporting the fuel from Des Plaines to O'Hare Field.

These are matters that we think the court should be apprised of as to the connections between these defendants, because by virtue of the statute if a taxable event occurs in

the State of Illinois prior to the departure of the plane, we think the statute applies. And again, since the plaintiff here, by virtue of a class action, we think the court ought to be apprised of the facts relating to this particular delivery system, and this is what we seek by virtue of this motion, and if in fact it has taken the plaintiff by surprise, we have no objections, Your Honor—

THE COURT: He says he is not raising that.

MR. CAMPBELL: All right. We have no objection, then, if the plaintiff has any serious objection to this motion, then, Your Honor, we would respectfully decline to say that we feel that the [144] facts have changed subsequent to the entry of this stipulation, to ask the withdrawal of paragraphs 5, 6, 7 and 8 of the stipulation, if the plaintiffs are unwilling to produce a witness who would testify as to the matters relating to the delivery system.

THE COURT: Well, it seems to me that whatever your purpose is in calling an officer of this corporation, I think you have a right to have them here. Then depending on what the line of interrogation is, then the court can determine whether or not it is proper. It seems to me that if there is a change in the situation which was not known to one of the parties at the time—or I don't mean change, I am a little ahead of myself, either a change in the factual situation has developed since the time the stipulation was entered into, or some facts that were not known to one of the parties, I think that is one of the exceptions that you have here, then they have a right to at least by way of further development or explanation, or something of that nature—perhaps the choice of language is not the best here, to develop. But there isn't any doubt in my mind, if they want an officer of this plaintiff corporation, they are entitled to have [145] them here.

MR. BERENS: We have no objection, as we said, to the subpoena to produce a witness.

THE COURT: I am not even sure they have to subpoena him. I think you are required to produce them.

MR. BERENS: Well, we are willing to produce him.

THE COURT: All right, I am sure you are.

MR. BERENS: All right.

THE COURT: But I just didn't want any misunderstanding—

MR. BERENS: I would like to add just one or two comments, if I may, in response to Mr. Campbell. First of all, I am surprised that he doesn't remember the agreement to withdraw the appeals for the stipulation. There were three of us in our office—

MR. CAMPBELL: I am not denying that. This may have been worked out with Dick Michaels in the appeals division. I wasn't in on the conferences, that is what I am saying.

MR. BERENS: I didn't mean with Michaels. We had a meeting the Friday before this was entered into, and that was one of the conditions. And, Cal, you [146] may remember after reflecting on it, you were present, and Roger Barrett, Bruce Hoff and myself of our office were present. But—

MR. CAMPBELL: I don't remember.

MR. BERENS: But it was for us a very important meeting at the time. But I would also like to emphasize—and I would like to offer this memo of law to Your Honor, that the case law in Illinois is very clear that these rules regarding standing by a stipulation applies equally to the state.

I mention this because Mr. Campbell has indicated that this is a tax case and that if a tax is due it should be collected. Apparently, the rules of orderly procedure of court and that parties agree to stipulations supercedes that concept.

I would like to mention one other thing, if we get into this delivery question, in addition to what we have called the basic question of whether the loading of fuel aboard an aircraft is a taxable use, we are going to very substantially

not only lengthen and complicate the trial, but we are also going to—if I may be so bold as to suggest it, complicate the problem that Your Honor [147] will have in making the resultant rulings that will be appealable, and I think we will be almost certainly back and forth between the Supreme Court on new trials, and so forth, with all of the possibilities that we have here among the issues.

Mr. Campbell also mentioned the class suit problem. We made the allegation for a purely defensive reason of not getting involved in a group of other class suits, which had been filed on the so-called trucking area at the same time. This is a class—possibly it is a class of one taxpayer of which no one else can belong. United is the only taxpayer who is buying fuel from Shell Oil under the conditions that have been alleged in the complaint, and as has been stipulated; so I think this class suit question doesn't advance the basic issue.

THE COURT: Well, I don't know about whether it is a class suit or not. Of course, that isn't really of any great consequence now. There is a question of whether or not the state has a right to seek to introduce evidence which is beyond the terms of the stipulation, and perhaps in contradiction of the terms of the stipulation, I don't know. I assume from the statement by each of you that that [148] may be the fact.

MR. BERENS: I am sorry, Your Honor, that which may be the fact?

THE COURT: That the evidence which the state produces—seeks to produce, would be in contradiction of the stipulation?

MR. BERENS: Yes.

THE COURT: I don't know. Whether it relates to something that is beyond the subject matter of that covered by the stipulation, these things I don't know; and I have no way of knowing anything until the person is produced, as

to what he is going to be asked, and whether or not it is relevant or pertinent in asking him these questions and for him to answer these questions. It seems to me that—I don't like to prolong these things any more than anyone else does, because time never frightens me.

Off the record.

(Discussion had off the record.)

THE COURT: We will meet, then, these questions that are now raised as they come before us; perhaps we may never—they may never appear. We have had that kind of thing happen. I think you have some other evidence, and I want to get on and hear it. [149] But as far as the Plaintiff's motion is concerned, I think that at some time in this proceeding that you will be required to have an officer of this plaintiff corporation here.

MR. BERENS: Well, we will have him here, and we will raise our objections at the proper time.

THE COURT: Then we will cross that when we come to it.

* * *

[153] Mr. Stark, would you take the stand, please.

(Witness sworn.)

THE COURT: All right.

JOHN HENRY STARK, SR.,

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HOFF:

Q. Would you state your name, please?

A. John Henry Stark, Sr.

Q. S-t-a-r-k?

A. Correct.

Q. Where do you live, Mr. Stark?

A. 33 Forest Avenue, Roselle, Illinois.

Q. And by whom are you employed?

A. United Air Lines.

Q. What is your title or position with United Air Lines?

A. My title and position with United Air Lines is Director of Petroleum Administration.

Q. Very generally, Mr. Stark, will you tell us what your duties and responsibilities are as [154] Director of Petroleum Administration?

A. My principal responsibilities are those of negotiating fuel purchase agreements for United Air Lines, and lesser responsibilities are in the area of leasing both fixed and mobile facilities to handle these fuels that are purchased, together with the purchase of all petroleum products required for the operation of United.

Q. Mr. Stark, are you familiar with the amount of Indiana gross income tax United incurs on the turbine fuel and aviation gas purchased from Shell at East Chicago, Indiana?

A. I am.

Q. Can you give us the amount of that tax from July 1, 1963, through December 31, 1967?

A. It is of the magnitude of $402,000.

May I refer to my notes?

THE COURT: This is from July what?

MR. HOFF: July 1, 1963 through December 31, 1967.

Q. If you made a note of that—the exact figure, Mr. Stark, I think you may refer to it.

A. Thank you. The amount was $402,842.95.

Q. Do you have an estimate of what the tax [155] liability for the Indiana gross income tax will be for United during the year 1968?

A. Yes, it will be of the magnitude of $150,000.

MR. HOFF: That is all the questions I have.

CROSS EXAMINATION

BY MR. CAMPBELL:

Q. Mr. Stark, does the plaintiff, United Air Lines, pay any sales or use tax in any other state on the purchase of the aviation fuel?

MR. HOFF: What aviation fuel, Your Honor?

THE COURT: I take it he means any petroleum.

MR. CAMPBELL: Yes, that is involved in this lawsuit.

THE COURT: Any petroleum.

THE WITNESS: Would you state your question again, Mr. Campbell.

MR. CAMPBELL: Would the reporter read the question.

(The question was read.)

THE WITNESS: Fuel involved in this lawsuit?

MR. CAMPBELL: Q. Aviation fuel that is involved in this lawsuit?

A. No, sir.

[156] Q. In other words, they don't pay any sales or use tax in any other state, and they don't pay the State of Illinois, is that correct?

MR. HOFF: Well, of course—

MR. CAMPBELL: Q. On the purchase of this fuel?

A. Well, we are purchasing the fuel in Indiana, Mr. Campbell, and we are paying the gross income tax in Indiana.

Q. You pay that to Shell or direct to the State of Indiana?

A. The gross income tax is added to our invoice by Shell.

Q. You pay it to Shell?

A. Yes, sir.

Q. You don't pay it to the State of Indiana?

A. No, sir; we pay an inspection fee of some small magnitude.

Q. This income tax of the State of Indiana, is this a tax

on United Air Lines, or a tax on Shell Oil Company, if you know?

A. I believe it is a tax on Shell Oil Company, and we reimburse them for this tax.

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[158] MR. CAMPBELL: Q. Would you explain the procedures involved in the purchase of aviation fuel from the defendant here, Shell Oil Company?

MR. HOFF: Well, now, Your Honor, this is the subject—in addition to the fact that we still believe it is beyond the scope of the direct, this is the very subject which Mr.—this goes to the delivery—the delivery facts, the delivery question. It is the very subject on which we just had the long argument.

THE COURT: That's right.

[159] MR. HOFF: And we submit that any question along these lines represents an attempt to go behind the stipulation to contradict the stipulation. We object to it on those grounds.

MR. CAMPBELL: We submit, Your Honor, that the witness has testified that he is the Director of Petroleum Products and we would like to know what this includes.

MR. HOFF: Well—

MR. CAMPBELL: Apparently he is a substantial employee of the plaintiff company here, and I feel that in order to elicit what his duties and what his functions are that this is proper; and these are matters that also—as I indicated, again, the plaintiff drew the stipulation, because they are more familiar with the facts than the State of Illinois officials, and I feel that in all honesty we have the right to go into the matter, and to ask the court to determine whether these are in fact the facts or not.

MR. BERENS: I think, Your Honor, there is one other element here. Not only do we have the question of going beyond the scope of the direct examination at this time, but plus our fundamental question. We [160] have, I think, a

further question. I said we would not contend surprise. But I didn't expect that we would put a witness on for one thing and then have the court allow the state to go beyond the direct.

THE COURT: Well, I think you may have a point there, counsel. I said that I didn't expect you to produce somebody in 15 minutes. I also said—I believe I said something to the effect that I could give you some time, too.

MR. BERENS: We don't want much, but a little more time because of the way this has developed.

THE COURT: And I want a little time to do a little thinking myself, too.

MR. BERENS: All right.

(Short recess had.)

THE COURT: I believe there was an objection?

MR. HOFF: Yes.

MR. CAMPBELL: Yes, Your Honor.

MR. HOFF: A pending question and a pending objection, I think.

THE COURT: Yes; please read the question.

MR. BERENS: And we objected for the three grounds of being beyond the—

THE COURT: One ground was it was beyond the [161] scope of the direct examination?

MR. BERENS: Yes, coupled with this, at the moment, is the suprise question.

THE COURT: A surprise question?

MR. BERENS: Well, surprise—I say, coupled with that, beyond the scope of the direct examination, is the question of suprise, that of producing a witness who is able to answer these questions immediately. We said we could do it promptly, but not in a few minutes.

THE COURT: Well—

MR BERENS: And finally, as our basic objection—

THE COURT: To some extent I am in sympathy with

you along that line. On the other hand, somewhere along the line, perhaps not today—and I took a quick look at your memorandum of authorities, and there is some basis for your objection. One of the things that I am not familiar with in any way, except that the papers are in the file, is the notice of appeal, and things of that nature—notices of appeal?

MR. BERENS: Yes.

THE COURT: And the basis of dismissing or [162] withdrawing one of the appeals, I don't know how they terminated, whether they were dismissed, and perhaps you can enlighten me on that, I don't know.

MR. HOFF: If the court please, they were dismissed. I handled that, prepared the papers, and therefore I know. We don't have them here in court, but we could produce them. I drew an agreed order, one for each court, because we had appealed to two different courts; and it was signed by myself, as attorney for United, and Mr. Campbell, as attorney for the state, and by Mr. Rall as attorney for the Shell Oil Company; and pursuant to those two orders, the appeals in the Appellate and in the Supreme Court were dismissed by the court.

MR. CAMPBELL: You mean Dick Michaels. I wasn't there.

MR. HOFF: Oh, conceded, yes. Yes, Dick Michaels, because it was the appeals section of the Attorney General's office we were concerned with. You are absolutely correct; you are absolutely correct.

THE COURT: So what other consideration there was for that, I am not familiar with it at all, or [163] whether if by virtue of that it places you in some prejudicial position.

MR. BERENS: Well, we are hardly in the position, Your Honor, to ask for leave to re-establish the appeals.

THE COURT: No, of course you are not, can't do that.

MR. CAMPBELL: Just to make a remark—

THE COURT: That I will agree on.

MR. CAMPBELL: —whatever happened on the interlocutory appeals, from those orders, could not serve the purpose to exempt—to grant an exemption to the taxpayers if the statute provides that they are taxable; so that the statements of counsel insofar as the basis for any dismissal of an appeal, could not serve to excuse a clear mandate of a statute, provided they are taxable.

MR. BERENS: Well, the standards that the courts have imposed on litigants in civil litigation is that in the absence of fraud or a mutual mistake, or changed circumstances—

THE COURT: Or public policy?

MR. BERENS: I don't believe the courts have raised that, but possibly we have overlooked one.

[164] THE COURT: I think I got that in your brief.

MR. BERENS: —that the parties must stick with their stipulation.

MR. CAMPBELL: Even if it means forgiving taxes?

MR. BERENS: Well, life must go on. We can't continue this forever and ever.

THE COURT: Well, you are asking me for a determination—

MR. BROMBERG: We think there is a mistake of fact here—or an absence of fact.

THE COURT: —and I am inclined to do this. I am not going to compel you to proceed, when you say that this matter comes as a surprise, and I can see where it does—

MR. BERENS: Only in the—

THE COURT: —I am inclined to allow this evidence, and at some time if you can—if I am convinced later on, if you can convince me, that I am in error I will strike it. But I have got to go on and get through with this lawsuit; sometimes we never get through.

• • •

[168] JAMES K. GOODWINE, JR.,

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BERENS:

Q. Would you state your name, please?

A. Yes, James K. Goodwine, Jr.

Q. Would you spell your last name?

A. G-o-o-d-w-i-n-e.

Q. What is your address, Mr. Goodwine?

A. 8 Elkin Court, San Rafael, California.

Q. By whom are you employed?

A. United Air Lines.

THE COURT: What city?

THE WITNESS: San Rafael, R-a-f-a-e-l.

[169] THE COURT: All right.

MR. BERENS: Q. Would you give us your educational background.

A. Yes. I have a Bachelor of Science Degree in Mechanical Engineering from Purdue University, which was granted in 1952; a Master of Science in Mechanical Engineering in 1956 and a Ph.D. in 1960. My graduate degrees are also from Purdue University.

Q. Is your Ph.D. in mechanical engineering?

A. It is in mechanical engineering, that is correct.

Q. Are you engaged in the full time practice of engineering?

A. Yes, I am.

Q. For how long, approximately, have you been so engaged, Doctor Goodwine?

A. Since roughly 1954, that would be not quite fifteen years.

Q. Would you give us a brief resume of your professional experience as a practicing engineer?

A. Yes, I will. In graduate school while working on my doctorate degree, I was on the research staff of Purdue University for one year and an instructor in mechanical engineering, specifically [170] fluid mechanics for two years after that. Upon receiving my Ph.D. degree, I was employed by the Chevron Research Company. This is a subsidiary of the Standard Oil Company of California, their research labs; and for the past seven months I have been employed by United Air Lines.

Q. Your work with Chevron Research Company, could you describe that in some brief detail, please?

A. Yes, I will. While I was at Chevron, I was assigned to the engine fuel section. For my nearly eight years there, I spent about five years in what was termed fundamental combustion studies. These embraced a wide range of theoretical oriented studies of fuels and combustion processes.

For the latter part of my career there, I was engaged in studies and research on aviation and diesel fuels. With the aviation fuels, this was primarily thermostability, and with the diesel fuel problems, primarily in low temperature operation.

Q. Would you give an explanation in terms that a layman can understand what you mean by thermostability of fuels?

A. All right. This is a—the behavior of fuels under a high temperature environment. This [171] would be temperatures above 300 degrees, which are typical of those encountered by the fuel in the engine environment in jet aircrafts.

Q. What is your present position with United?

A. At the present time I am a staff engineer. I am in the performance and development section; that would be the mechanical engineering division of the engineering department of United.

Q. What do your present professional duties basically involve?

A. We have a rather wide range of assignments in this particular group. With respect to my own work, I am primarily engaged in the applications of fuels in engines. In other words, the interactions of the two fuel problems as they pertain to engine operations.

This leads us into such things as air pollution, which is one of my prime responsibilities; and of late, I have also been getting into some material studies in turbine engine construction, somewhat different.

Q. Do any of your present projects for United involve the effect of temperature on fuel?

[172] A. Yes, they do. As part of our studies of fuel, we are engaged in setting and determining meaningful specifications. These include the ability of the fuel to withstand, say, low temperatures, so we are actively engaged in studying the low temperature environment of jet fuel on aircraft.

Q. Do you have any specific projects in process or have you completed any—I will rephrase that question.

Have you completed, or do you have any specific projects in process regarding the effect of low temperatures on fuel?

A. Yes, we do. At the present time we are interested in determining whether our present freezing point specification, an important item between the fuel consumer and the fuel supplier, is at an appropriate level. In order to accomplish this, we have two programs going. One of these consists on all DC-8 and 720 flights of the crew recording the temperature in the fuel tank at the point of descent. Now, this is the point at which the aircraft starts to descend, which normally is the lowest temperature that the fuel would experience during that flight.

[173] This data is being handled on a computer compilation program, it is a large volume data. In addition to that,

we have on one aircraft a continuous record of the fuel temperature while the aircraft is in flight. This is a flight type recorder, which continuously reads on a chart the temperature of the fuel in the tank.

Q. You mentioned that these studies involve low temperature problems?

A. That is correct.

Q. Would you explain how low temperatures are involved in aircraft fuel?

A. Yes. At the altitudes at which jet aircraft operate, the ambient or outside air temperatures are quite low. These normally run in the order of minus 65 to minus 70 degrees Fahrenheit in the wintertime, and perhaps 10 degrees warmer than that—in other words, minus 55 to minus 60 degrees Fahrenheit in the summertime.

Q. Do you have any data of temperatures incident to the studies of fuel stored on the ground at the time it is loaded into the plane?

A. Yes, we have. We have obtained a limited amount of data in that regard at various stations of [174] interest.

Q. Do these stations include O'Hare Airport?

A. Yes, one of these is O'Hare Airport.

Q. What do the preliminary data concerning O'Hare —what does the preliminary data concerning O'Hare show as to the temperatures of the fuel as it is loaded onto the plane?

A. Generally, we find that the temperature of fuel as it is loaded onto the plane follows rather closely the average ambient temperatures for that time of year. In the coldest month, which seems to be January, these temperatures are about 32 degrees Fahrenheit, they are about freezing, and as the temperature becomes warmer some of these temperatures go up. I would say that the average winter temperature would be about 40 degrees Fahrenheit; the average summer temperature would be about 60 degrees Fahrenheit.

Q. This is in the Chicago area?

A. This is in the Chicago area.

Q. Would you relate in terms of temperature differential, these winter temperatures—winter and summer temperatures of the fuel aboard the aircraft with the winter and summer temperatures of the fuel [175] being loaded onto the aircraft?

A. Yes. A limited amount of data, of which we have gotten on this program I described previously with the temperature at the point of descent and our other recorder studies, which are not complete, by the way, indicate that in the month of January the temperature on board the aircraft when it touches down averages about minus five degrees Fahrenheit. We do not have data for the summer months. I would suspect that this ten degree differential I mentioned previously would still hold, and that in the summertime the temperatures upon touch down in the tank would be about plus five, coupled with our 40 and 60 degree estimates it would give a temperature differential as between the fuel going in and the fuel already on board as the plane lands of say 45 to 55 degrees.

Q. If I understand you correctly, Doctor, you are saying that the temperature in the tank of the plane as it is landing is much colder by these ranges you just mentioned than the fuel that is going to be added to the tanks of the plane?

A. That is correct.

THE COURT: There would be about a 45 degree [176] difference?

THE WITNESS: Right, that's correct.

MR. BERENS: What happens in the fuel tank when the warmer ground fuel is added to a tank containing a much colder fuel?

A. The colder fuel is more dense; that is, it weighs more per cubic foot. A cubic foot of this colder fuel weighs more than a cubic foot of the warmer fuel, therefore, the dense

fuel tends to go to the bottom of the tank and the warmer fuel which is added and is lighter tends to rise to the top of the tank. This leads to a stratification where we have low temperature fuel on the bottom of the tank and progressively higher temperature fuel on the top.

Q. You referred to a stratification, would this be a series of layers of temperature, from the colder to the warmer, from the bottom to the top?

A. Yes, it could be thought of in that sense. Certainly, the coldest fuel is at the bottom, the warmer fuel is at the top, and they could be defined in terms of layers, although these layers may not be very distinct in some cases.

Q. Is there any scientific data available [177] as to the change of weight, or I should say, density of the fuel over changes in temperature?

A. Yes, this is fairly common data and could be obtained from any petroleum supplier. Memory tells me that for density changes you get about a five per cent change with a hundred degree Fahrenheit change in temperature, rule of thumb.

Q. Well, would that interpolate so that a change of fifty degrees Fahrenheit would represent an increase in weight of about two and a half per cent?

A. Yes, that would interpolate and would be about two and a half per cent.

Q. Is the fuel loaded into the aircraft always warmer than the fuel already on board?

A. In nearly all cases that would be the normal operation.

THE COURT: This is in jets, I take it? Or is it on all planes?

THE WITNESS: It would be true to a limited extent on a piston aircraft, but since they operate at a lower altitude, the difference would not be as great.

MR. BERENS: Q. Directing your attention to the fuel lines on jet aircraft that run from the tanks [178] on the aircraft to the aircraft engines, at what point in the tanks do the fuel lines come in?

A. This varies from aircraft to aircraft, but generally, they are on the bottom surface level of the tank.

Q. You say "generally." On what type of tank would not the fuel line be on the bottom?

A. I can't conceive of that.

Q. What does the fact that the exit point of the fuel tank to the engine—I would like to rephrase that question. The fact that the exit point from the fuel tank to the engine is on the bottom, what does that indicate in terms of this stratification of the colder from the warmer fuel?

A. Well, this would indicate that the first fuel burned on, say, take off would be the colder fuel, that which is located at the bottom of the tank.

Q. Are the fuel lines from the tanks to the engine fed by gravity or are they pressurized by a fuel pump?

A. In all commercial aircraft, they are pressurized by a fuel pump.

MR. BERENS: That is all I have.

[179] MR. BROMBERG: If the court please, I move that all of the testimony of this witness be stricken as not relating in any way to any of the issues in the case.

THE COURT: Motion will be taken under advisement.

## CROSS EXAMINATION

BY MR. BROMBERG:

Q. Doctor, you say generally the fuel in the tank on touch down goes to the bottom of the tank. Are these cases where it doesn't?

A. The fuel that is in the tank on touch down will, of course, be on the bottom of the tank. This would be a layer of fuel. With respect to the argument, we were differentiating that fuel from any fuel subsequently added.

Q. Well, the point is that the fuel that is already—that is added is added from the top, isn't that right?

A. No, that is not correct.

Q. At what point is it added into the tank?

A. Fuel is added into the tank at the bottom on commercial jet aircraft.

Q. Well, now, when the fuel is added, does it push up the fuel which is already in the tank?

[180] A. It will disturb it to some extent; that's right, it has got to displace that which is immediately over the point of which the fuel is entering.

Q. In other words, then, the new fuel displaces the old fuel and it is the new fuel which is on the bottom, is that right?

A. It moves it out, so it can move up—

Q. Right. And since the fuel comes out of the tank to the engine from the bottom, it is the new fuel that is going into the engine and not the old fuel, isn't that correct?

A. No, that is not correct.

Q. Well, will you please differentiate between the two and how it works?

A. Well, I thought we did that.

Q. Outside of the temperature aspects—I am talking about the physical displacement.

A. All right. The reason for the physical displacement is that cold fuel wants to be on the bottom of the tank, the warm fuel wants to rise. An analogy might be you light a cigarette and the smoke goes up, it displaces air on either side of it, but the smoke goes up and where the smoke ends up is on the top of the room, and I think the same situation [181] applies here. Certainly, where this pipe comes in and the old fuel is lying on top of the pipe, for new fuel to enter it has to be pushed out, it would tend to be pushed sideways, not up and the new fuel then will rise as a column through the old fuel and end up disbursed over the top of the tank.

Q. Well, isn't it a fact, Doctor, that the new fuel and the old fuel is intermingled?

A. There is bound to be some degree of mixing, that is correct.

Q. So there is no definite way of determining which goes into the tank—into the engine first, whether it is the old or the new, or parts of the old and the new, is that correct?

A. The coldest fuel will be going into the engine first.

Q. You say it was comingled to some extent?

A. Yes.

Q. That would mean that part of it would represent the new fuel going in as well, isn't that right, if it is comingled?

A. As I envision the situation, we have a layer of very cold fuel at the bottom of the tank. Then we have a second layer, which is comingled fuel [182] of some unknown depth. At the top we have a layer of the most warm fuel. The first fuel out is the coldest fuel and the fuel which most likely—or is the fuel that was left over from the previous flight.

Q. Well, Doctor, I don't want to belabor the point, but the fact is when we spoke about comingling, there isn't specific layers that are definable by instruments, are there, layers that are developed between the old and new fuel?

A. They could be determined by gradations.

Q. But you say that they have been comingled to some degree?

A. Yes.

MR. BROMBERG: That is all.

THE COURT: Doctor, let me ask you, I take it, then—

MR. BERENS: If Your Honor please, one moment—

THE COURT: I wanted to ask some questions.

MR. BERENS: I thought you were dismissing him.

THE COURT: —then when the jet plane takes off, it takes off on the cold fuel?

THE WITNESS: Yes.

THE COURT: Eventually, the warm fuel, when it gets to this cold altitude will become cold?

[183] THE WITNESS: That is correct.

MR. BROMBERG: There was one more question we omitted.

Q. Is there any difference, scientifically, between the cold fuel and the hot fuel mixing as there would be between cold water and hot water?

A. In layman's terms, I would say no. If you wanted to belabor the point, water is a simple fluid, fuels are not.

MR. BROMBERG: I think we got the answer we wanted.

MR. BERENS: No further questions, Your Honor.

THE COURT: You may step down.

(Witness excused.)

MR. HOFF: If the court please, we would like to file—a week ago last Friday, we served on the state a request for admission, requesting them to admit that they—that the Department of Revenue had issued no published rule, regulation, bulletin, ruling or other document which interprets or applies the Illinois use tax in the manner similar to that applied by this bulletin.

I would like to file that request for admission with the court at this time; and I think—[184] I guess Mr. Campbell has something that he wants to file in response.

MR. CAMPBELL: We have objections to the request, Your Honor, which we ask leave to file.

MR. HOFF: Well, I don't know how we could have possibly made the request for admission any more explicit than we did.

THE COURT: I am trying to find something around here. I am out of a clerk. It seems to me, I would like to mark these files so that when I start digging them up later

I will find out when was this done; when was this done. See if I can find a clerk around here.

(Short interruption.)

MR. HOFF: Well, Your Honor, they say that it is vague and ambiguous.

THE COURT: Well, let's have a look at it then.

All right.

MR. HOFF: I don't know how it could have been made more explicit, have they ever issued a rule, regulation, bulletin, ruling or other documents that interprets or applies the Illinois use tax to tangible personal property in a manner similar to the bulletin which is involved in this case. It speaks for itself. [185] either they have or they haven't. If they have, we assume that they are going to tell us what it was. If they haven't, why we assume that they will admit the request. They say it is improper. I don't know what that means. They also say it is irrelevant. Well, of course, it is relevant to our contention that this is a discriminatory application of the use tax.

If they can point to no other item of tangible personal property to which they have applied the tax in a comparable manner, why that would certainly support our charge of discriminatory interpretation.

THE COURT: Well, I don't know, I think I perhaps understand Mr. Campbell's position that in the first place he doesn't agree with you on the fact that it is purchased outside of the state, brought into the state and temporarily stored here and then used partly inside and partly outside of this state—I think it is perhaps the language that Mr. Campbell objects to?

MR. CAMPBELL: Yes, it goes on and on. Perhaps if it stops where counsel has just quoted, we may have been able to comply with this request.

[186] MR. HOFF: Have you issued—maybe I should just ask the question of counsel. Has the state issued any other

comparable bulletin applicable to fungible tangible property?

MR. CAMPBELL: There we go again, Your Honor; and the tax liability here, if any, arises by virtue of the statute, not by virtue of any bulletin, not by virtue of any rule or regulation but by virtue of the statute. The rule—

THE COURT: Well, of course, there was a change in 1963?

MR. HOFF: There certainly was.

THE COURT: In the regulations?

MR. CAMPBELL: No, Your Honor, the bulletin itself on its face recites that this is an effort to clarify the position of the department. It is not a rule, it is not a regulation; but it did have the effect of affecting, perhaps, let us say, an entire industry. This is, of course, the reason for the injunction that you entered yesterday so as to remove the prior period from any consideration whatsoever, so that only the prospective period was involved; and the basis by which the department of revenue is operating is the statute and not by virtue [187] of any rule or regulation or bulletin, but the statute itself.

MR. HOFF: Well—

THE COURT: Well, as I understand, Mr. Hoff, in my perhaps poorly chosen language, that you mean has the state by a rule or regulation in connection with any other tangible personal property changed its position that a portion of it at one time was subject to the use tax, and then later it took the position that all of it was? Am I getting reasonably close to your point?

MR. HOFF: Well, Your Honor, close, yes. Maybe I don't—

THE COURT: I feel good.

MR. BROMBERG: He wants it on the button.

MR. HOFF: There certainly was a change here; and we complained about the fact that there was a change, among

other things, but also we contend that the state by this bulletin is applying the use tax to fuel used by air lines, railroads and other types of transportation companies in a manner different than they apply it to any other type of tangible personal property—fungible tangible personal property. Now, if they can point their [188] finger at any other item of fungible tangible personal property that they tax in a manner similar to this, we want them to do it. If they don't, if they can't point their finger, why we want their admission to the effect that they can't point to any comparable interpretation or position that applies this tax. We are entitled to defend ourselves against liability from this tax on the grounds that it is discriminatory and that is the issue to which this request is directed.

MR. CAMPBELL: Counsel is pleading—or being inconsistent if he is alleging that they are taxable and that the tax is not being applied to other similarily situated, then this is inconsistent with the pleadings that have been filed here, because the very purpose of their pleadings and their position has been that they are completely exempt.

Now, counsel is taking the position that they are—if I understand him correctly, that he is now saying the plaintiff is now taxable, but that the tax is not being applied to others in a uniform manner.

MR. HOFF: The difficulty—

MR. CAMPBELL: It appears that this is [189] inconsistent with the position that he has taken.

MR. HOFF: The—

MR. CAMPBELL: Secondly—

MR. HOFF: Excuse me, I am sorry; I thought you were done.

MR. CAMPBELL: —counsel speaks about fungible tangible personal property. I have been in this field a while, this is the first time that I have heard this expression, when United filed this suit, and I am certain that it does not ap-

pear any place in the rules or regulations of the Department of Revenue. We do have Mr. Corrigan who is head of the rules and regulation department of the Department of Revenue, and we have conversed in an attempt to answer this admission, if we were sure of what counsel is seeking.

MR. HOFF: Well—

MR. CAMPBELL: We are not aware of personally—I don't think he is aware of any such additional bulletin that we think that counsel has reference to, and I am personally not aware and I don't know that this would satisfy counsel or not. But—the department, of course, has issued numerous rules and regulations under the use tax act since—

[190] MR. HOFF: You say you are aware of no other bulletin comparable to this one?

MR. CAMPBELL: I am not personally aware of any.

MR. HOFF: Well, does—

MR. CAMPBELL: Here is Mr. Corrigan.

MR. HOFF: Well, is Mr. Corrigan aware of any comparable—

THE COURT: If Mr. Corrigan isn't aware of them, nobody is.

MR. CORRIGAN: Thank you, Your Honor, I am glad to hear that. No, I am not aware of any; but I would say that it has always been our position that when the temporary use ended, then the use—the taxable use began here in the state, assuming that it ended in the state. Therefore, the question—there would have been no call for any other—any additional bulletin or anything of that nature. And in this instance it appears that the air lines were taking advantage of perhaps—at least this is our contention, of lack of knowledge on the part of the department, that we were even allowing the exception in the first place; when our Director of Revenue at the time became aware of the situation he immediately [191] ordered the issuance of this particular bulletin to clear up the discrepancy, and we

have made the—we have agreed to the injunction here so that they would not have suffered retroactively because of the misunderstanding.

As a matter of fact, what happened is that they had to clear—in effect, a practical matter was that they had an exemption, now we are claiming that they no longer have the exemption. Our contention is that there was discrimination in their favor. Previous to that time—

MR. BERENS: Well, I think we are getting now into the basic issue of the case. Our request for admission is a little more narrow than that, if I may suggest. Now, we have trouble on whether it is fungible or the definitions of terms, but what we contend is a discriminatory application, and, therefore, evidence that their interpretation of the law may be contrary to the law. Maybe I can bring this out by an example. A building contractor buys a load of bricks in Indiana, delivery stipulated to being in Indiana, and brings them to a construction site here where he himself is the converter into real estate, he brings a load of twelve thousand [192] identical bricks, dumps them on the construction site, figuring he is going to use all twelve thousand.

In the course of the construction his plans change and he uses eight thousand bricks, converting it into real estate, and therefore, a taxable use under the rules as I understand it; he takes the other four thousand from the construction site and hauls it off to Wisconsin for a new job. As I understand it, that would not be taxable according to the published interpretations of the department; that would not be taxable, let me make that clear, the four thousand that were hauled away.

We think that our situation of the fuel that we bring in from Indiana and that we store in the ground at O'Hare for a while and then put aboard the plane, some of which we burn in Illinois, but most of which, which we put aboard

here, is from any view point going to be consumed somewhere else in this country. We think that is identical to the brick situation.

They say in our case that a partial use in Illinois, that is, part of the fungible bulk made the whole fungible bulk taxable. We say we [193] are not different from the bricks, or I can give examples of coal or other types of fungible things—flour, cereal. And we have alleged in our complaint and it was denied in their answer that this is a discriminatory interpretation, and therefore, a wrong interpretation. We have to prove that. We have the burden of proof on that because it was denied in the answer. And we don't know, frankly, how we can go about proving it except by going to the people in the department who know how they are interpreting the law, unless you are willing to take judicial notice that there is no other regulations and published bulletins analogous to this?

THE COURT: I am afraid I couldn't do that.

MR. CAMPBELL: Regarding the brick situation, I think the state of Wisconsin might have some say so without answering whether Illinois would tax all of the bricks or not; and I think the state of Wisconsin would also have some say so in the four thousand bricks that arrived in the state of Wisconsin; but the air lines completely escape all taxes in every state because it is consumed in the air; so that I think the analogy is not proper.

[194] MR. BERENS: I don't think that is—excuse me, Cal, I am sorry.

MR. BROMBERG: All these regulations that are issued by the Department are published. If there is any regulation, he knows—he just spoke of one, if he thinks it has an analogy to the case at bar he is perfectly at liberty in his closing argument to present all of these things or introduce them in evidence.

MR. CAMPBELL: The second point I wanted to make, counsel mentioned the interpretation of the Department of Revenue. First of all, the interpretation of the Department of Revenue might carry some weight, might be persuasive, but the final decision rests with the court as to the interpretation of any statute. And the only thing that has been attempted here is to provide Your Honor with all of the facts so that Your Honor can apply the law. Your Honor can interpret the law, and if the Department of Revenue has had in the past any erroneous interpretation of the law, it is not binding on this court. And this court is the last—

THE COURT: I am not liable—

[195] MR. CAMPBELL: Yes, the court has the last say. So when it comes to the interpretation of an act, and I repeat, Your Honor, we are not attempting—the department is not attempting to assess the tax here by virtue of a rule or regulation; the authority comes from the use tax act, and the use tax act either imposes the taxable obligation on the plaintiffs here or it does not.

THE COURT: And the change in the regulation in '63—

MR. BROMBERG: There was no change.

THE COURT: Yes, there was.

MR. BROMBERG: There was no change, Your Honor, just a change in interpretation.

THE COURT: Well, change—let's not quibble over words.

MR. BROMBERG: Well—

THE COURT: It is a re-evaluation and a different construction of the statute.

MR. BROMBERG: Right, correct.

MR. CAMPBELL: We alleged in our answer that it really clarified—

MR. BERENS: If I may say, we keep on coming back to the basis issue of the case, and I would like to confine this argument here to the point that we have got to attempt

to prove a negative; and I don't know how we can submit proof that nothing exists. We thought the way to do it originally was interrogatories; the state was very much against answering the interrogatories. We tried working it a different way, that is, by this request for admission and we just can't seem—and you have expressed the opinion a moment ago, that you might have difficulty taking judicial notice that these don't exist. We think that relevant to our contention that this is discriminatory interpretation is the fact that it is a unique interpretation—we don't think that the facts are that unique, that they are not that different from the brick example which, incidentally, if Wisconsin doesn't have a sales tax, would that make a difference in Illinois?

MR. CAMPBELL: Well, we have enough trouble with Illinois.

THE COURT: Substitute Iowa for Wisconsin—

MR. BERENS: But counsel's point whether it is taxable in Illinois should depend on whether it went to Iowa or Wisconsin.

[197] THE COURT: Well, I don't know, Mr. Berens, it seems that each one may present an entirely different situation and factual question. It is easy to separate four thousand bricks out of twelve thousand bricks. Now, I don't know whether you can separate two thousand gallons of gas from ten thousand gallons of gas and retake it out of storage and take it somewhere else. It seems to me that these regulations are public, I am sure. The department, or Attorney General, I am sure, probably would furnish you with all the regulations that are relevant or relate to this particular statute, anything that comes within the purview of the use tax act, I don't know how many there are, I suspect there are quite a few.

MR. BERENS: Well, we think we have them all, but it is the problem of proving the negative.

THE COURT: Well, this I don't know. I think that it depends upon perhaps the wording. Now, when you say—

MR. HOFF: We will be happy to revise the—I mean, if there is a formulation of the request that would—

[198] MR. CAMPBELL: Well, Mr. Corrigan doesn't know of any, I don't know of any. We will be happy to continue the investigation. But I don't know—

MR. BERENS: Well, are you making this of record that this is admissible?

MR. CAMPBELL: I beg your pardon?

MR. BERENS: Are you making this as an admission of record that there isn't any in response to our request?

MR. CAMPBELL: No. I say—

THE COURT: He said he didn't know of any. He didn't say there weren't any. He said he or Mr. Corrigan didn't know of any.

MR. HOFF: Mr. Campbell and Mr. Corrigan have looked and they haven't found any?

MR. CORRIGAN: Your Honor, part of the problem here, I submit, is that the language is so broad that I am not sure of what they want; so I am not certain in my own mind of the existence or non-existence of them, because I don't know what existence they are talking about, really.

THE COURT: It is a little difficult, Mr. Berens and Mr. Hoff—

MR. CAMPBELL: This is why the interrogatories—

[199] THE COURT: —"tangible personal property purchased outside this state, brought into this state and temporarily stored here and then used partly inside and partly outside this state in a manner equivalent or similar to the interpretation expressly limited to motor fuel." That puts

quite a burden on them to try to determine if they are similar, equivalent to—

MR. BERENS: Well, I think as you and Mr. Campbell pointed out, Mr. Corrigan is the expert here, certainly it is less burdensome on him than it is on us. We are practicing attorneys; we are not specialists.

MR. CORRIGAN: I would request, Your Honor, that as attorneys that they be requested by you to make themselves clear. This is the trade of attorneys, to express themselves clearly.

MR. BERENS: All right, we can cut this short and see if we can reach some agreement that we can get the request we want to you in a way that you feel is clear enough so you can answer. Can we try to work this out?

THE COURT: I believe, Mr. Berens—I am not an expert in this field, by a long ways, but [200] I would have a little difficulty answering this, believe me.

MR. HOFF: We will see if we can work out some other formulation.

THE COURT: I think it can be boiled down to inquire of the department to answer the attorneys for the parties —answer it yes or no. I have an idea what you are seeking.

MR. HOFF: Yes.

THE COURT: And I think it would be helpful here, it would save a lot of time and trouble, too. Both of you have difficulties, too. Probably he can answer it yes or no.
Now, do you want to just hold these before we file them—

MR. HOFF: Well, why don't we leave them on file and perhaps we will file some sort of an amendment.

THE COURT: All right, put them in the file.

• • •

[207] EDWIN D. MAXFIELD,

a witness called by the defendant herein, under Section 60 of the Civil Practice Act of Illinois, having been first duly sworn, testified as follows:

EXAMINATION

BY MR. CAMPBELL:

THE COURT: Your first name, Mr. Maxfield?

THE WITNESS: Edwin D. Maxfield.

MR. CAMPBELL: Q. Where do you live, Mr. Maxfield?

A. I live at 4 Woodland Road in Old Westbury, New York.

Q. And your occupation?

A. I am manager of aviation sales for the United States, Shell Oil Company.

Q. How long have you been so employed?

A. As manager of aviation sales?

Q. Yes?

[208] A. For the U.S. only since the first of the year, as far as the United States is concerned. However, I have been in aviation sales since 1946.

* * *

[212] MR. CAMPBELL: Q. What is the source of this fuel, Mr. Maxfield?

A. The source of the fuel is East Chicago, Indiana.

Q. Where does the fuel come from prior to East Chicago, Indiana?

A. Well, our crude is brought from, essentially, West Texas and Oklahoma to Wood River, Illinois, where we have a refinery that refines this crude into the fuel that is delivered to United Air Lines at East Chicago.

Q. The fuel is processed and refined at Wood River, Illinois, is that correct?

A. That is correct.

Q. Now, how does it get to East Chicago, Indiana?

A. By a 250-mile products pipeline to East Chicago.

Q. And these pipelines are owned by whom?

A. By the Shell Oil Company.

[213] Q. Now, when the fuel arrives at East Chicago, Indiana, what takes place there?

A. It is stored and it is settled until a request for delivery from United Air Lines.

Q. How often do you receive requests from United Air Lines?

A. Generally once a month, we receive a request from their agent at our East Chicago terminal, outlining the shipments that are to be made for the next month.

Q. Where is this agent located?

A. At Lockheed Air Terminal, and they are located at O'Hare Field.

Q. And this is the agent of United Air Lines?

A. Yes.

Q. They place the request with you for fuel?

A. That is correct.

Q. Does United Air Lines have any employees, to your knowledge, at your East Chicago, Indiana facilities?

A. No, they do not.

Q. Now, when you received a request—or [214] you receive a request once per month, I believe you stated, approximately how many gallons of fuel would this involve, on an average?

A. On the average about 18 million gallons of turbine fuel to be delivered, generally speaking, three times during the following month.

Q. Now, is United Air Lines the only air line that you service at O'Hare Field?

A. We don't service any air lines at O'Hare Field. We deliver it at the East Chicago terminal to United and to American Air Lines.

Q. Only those two?

A. We do have some other air line accounts that we deliver gasoline to, aviation gasoline, at East Chicago.

Q. Would that be from the East Chicago facilities, the same fuel?

A. Yes, sir—it would be aviation gasoline.

Q. And this would be delivered from the facilities at East Chicago, Indiana?

A. That is correct, sir.

Q. What are the names of these air lines?

A. I am not sure that I can name all of them. [215] One of them is Delta Air Lines; one of them is Lake Central Air Lines. I believe that is all.

Q. Where do you deliver the fuel to Delta Air Lines?

A. At East Chicago, Indiana.

Q. Where do you deliver the fuel to Lake Central Air Lines?

A. At East Chicago, Indiana.

Q. Does the delivery of the fuel follow the same pattern for Delta and for Lake Central as in the case of United Air Lines and American Air Lines?

A. You mean insofar as our facilities are concerned?

Q. Yes?

A. Yes.

Q. Does American Air Lines have any employees at your East Chicago, Indiana facilities?

A. No, sir.

Q. And nor does Delta or Lake Central?

A. No, sir.

Q. Now, what happens to the fuel—you spoke about 18 million gallons of gasoline, of [216] gas aviation fuel per month, on the average?

A. Yes, sir.

Q. What happens to the fuel when it leaves East Chicago, Indiana?

A. We are directed by United's agent to deliver it to the West Shore Pipeline meter station at Hammond, Indiana.

Q. Do you know who owns the West Shore Pipeline?

A. I know there are ten owners.

Q. Would you name those, please?

A. I am not sure—if I could refer to notes, I could name all of them.

There is Shell, there is Mobil Oil Company, there is American Oil Company, the Humble Oil Company, Pure Oil Company, Clark Oil Company, City Service Oil Company, Texaco, Marathon and Continental Oil Company.

Q. What interest does Shell own in the West Shore Pipeline?

A. Twenty per cent of the stock.

Q. Now, prior to your delivery of the fuel to the West Shore Pipeline, do you bill United Air Lines for the fuel upon the arrival in East [217] Chicago, Indiana, at that juncture?

A. Well, you say prior. I am not sure that I understand you. When it is delivered to Hammond—to the West Shore meter station it is then billed to United Air Lines.

Q. Where is the billing sent?

A. The billing is sent to United Air Lines in Des Plaines, their main office is, I believe it is Des Plaines.

Q. Does the Shell Oil Company pay any fees to the West Shore Pipeline?

A. No, sir.

Q. All of the fees to the West Shore Pipeline are paid by United?

A. Yes, sir.

Q. Do you know how that billing is determined?

A. No, sir, I don't.

Q. By owning 20 per cent, do you have any directors

on the West Shore—does Shell Oil Company have any directors on the West Shore Pipeline?

A. Yes, sir, we have one.

Q. Do you have any officers?

[218] A. No, sir.

Q. Now, upon your delivery of the fuel to the West Shore Pipeline, do you insure this fuel at that point?

A. No, sir. After—you mean after it is delivered to the meter station?

Q. Yes?

A. No, we do not insure it.

Q. Now, once the fuel is delivered to the West Shore Pipeline, what happens to the fuel after that point, if you know?

A. Well, it is my understanding of the situation that United, or the West Shore Pipeline delivers it to United Air Lines at Des Plaines.

Q. Are you familiar with the procedure that is followed at the end of the journey at Des Plaines?

A. Not very familiar; I have never seen the procedure, no.

Q. Would these be described as the storage facilities in Des Plaines?

A. Yes, sir.

Q. And who owns the storage facilities in Des Plaines?

[219] A. The Shell Oil Company.

Q. Do you know whether Shell—or would you describe the storage facilities at Des Plaines?

A. There is several tanks—well, first, coming from West Shore Pipeline, there is a line leading from the West Shore Pipeline to the facilities which I believe is a sixteen inch line, about a thousand feet; there are several tanks; there are pumps; there are filters and a small pump house, and there are two six inch lines running from that facility over to the edge of O'Hare Field. These are all leased by the Shell Oil Company to United and American.

Q. When was the lease that you referred to entered into?

A. I believe in December of 1959.

Q. Does United pay rent to Shell Oil Company for the use of the facilities at Des Plaines?

A. Yes, sir.

Q. How is that rent determined?

A. That is determined by a through put fee.

Q. Would you explain that, please, for [220] the benefit of the record.

A. This is a common usage in the oil industry to determine rent of facilities. In other words, it is on the basis of the volume put through the facilities and the rent is determined in that way.

Q. How often is the rental paid for the use of those facilities?

A. I believe once a month. I don't honestly recall what the period is, but I believe it is once a month.

Q. Do you have a written contract—a written lease?

A. Yes, sir.

Q. Does the—I am not certain whether you said several tanks or seven tanks?

A. Several; several tanks.

Q. What is the capacity of the tanks?

A. I am sorry, I don't have those records right with me. I can—

Q. Now, is it my understanding that you service—how many airlines are serviced from the seven or several tanks at Des Plaines?

A. Only American Air Lines and the United [221] Air Lines.

Q. From what source are the air lines, Delta and Lake Central, serviced?

A. They engage a common carrier to pick up products at the East Chicago terminal.

A. Are these trucks?

A. Yes, sir; transportation trucks.

Q. Does American Air Lines have any employees at the Des Plaines storage facilities?

A. They retain an agent or have a contract with Lockeed Air Terminal to manage the facilities at Des Plaines.

Q. But as far as you know, United Air Lines does not have any employees at your Des Plaines storage facilities?

MR. BERENS: I object to the use of the phrasing that Shell services the customers at O'Hare, this last phrase here of "your storage facilities." It has been established that these are leased facilities.

THE COURT: Well, perhaps the language—

MR. CAMPBELL: He said they owned—Shell Oil Company owned the facilities.

THE COURT: Read the question again, please.

[222] (The question was read.)

MR. BERENS: Your Honor, we think—

THE COURT: At your Des Plaines storage facilities, which is owned by Shell and leased to American and United?

MR. BERENS: Yes.

THE COURT: All right, answer that question.

THE WITNESS: United Air Lines also with American Air Lines engages the Lockeed Air Terminal Corporation to manage the Des Plaines facilities.

MR. CAMPBELL: Q. These are employees—I again repeat the question, does United Air Lines have any employees at your Des Plaines storage facilities?

A. I really don't know whether they do or not.

Q. Do you know whether American Air Lines has any employees at your Des Plaines storage facilities?

A. No, I do not know.

Q. Now, I believe you stated that the fuel that was removed from the storage facilities is for United and American Air Lines?

[223] A. The storage facilities where?

Q. In Des Plaines?

A. United and American do store their fuel there, yes.

MR. BERENS: Object to the question. His testimony had established that it was owned at that time by United and American Air Lines. The question says the fuel that was for United Air Lines. Again, this whole line of questioning is ignoring the answers, and implying a different set of facts than were testified to.

THE COURT: Well, let's hear the question again.

(The question was read.)

THE COURT: What is your objection to that question?

MR. BERENS: Well, he stated—he quoted the witness, Your Honor, saying that the witness had stated that the fuel at Des Plaines was for American and United. The witness had already testified that the fuel was owned by American and United and had been in their possession since some time in Indiana. This is a whole series of [224] questions—

THE COURT: Well, I don't read that into the question. But just so we don't get the record confused, I will sustain the objection; and to clear the record, ask a new question, Mr. Campbell.

MR. CAMPBELL: Q. When fuel is—when you receive an order from American Air Lines for the purchase of fuel, you receive this order in East Chicago, Indiana?

A. That is correct, sir.

Q. Where does that fuel go, does it go to Des Plaines, the storage facilities?

A. It depends on where American or Lockeed, as their agent, direct us to load. In other words, it could be that they have directed us to turn the fuel over to West Shore Pipeline at Hammond, Indiana, or in some cases they may send a common carrier truck in to pick up the fuel there and I presume that they could take that either to Midway Airport or to O'Hare Airport.

Q. Maybe I didn't make myself clear. I believe that you testified that the storage facilities owned by Shell Oil in

Des Plaines are [225] leased to United and American Air Lines, is that correct?

A. That is correct.

Q. And—

THE COURT: Together with the pipelines?

THE WITNESS: Together with the pipelines; it is all what we call facilities.

THE COURT: Yes, okay.

MR. CAMPBELL: Q. Fuel is stored there for the use of both air lines, is that correct?

A. Fuel is stored there by United—fuel owned by United and American is stored there.

Q. All right. Now, when you mentioned several times—does United keep their fuel separate and apart from the fuel belonging to American?

A. No, they do not.

Q. The fuel is comingled?

A. That is correct.

Q. Now, while the fuel is being held in the Des Plaines facilities, does Shell pay—Shell Oil Company pay the insurance while the fuel is in Des Plaines?

A. No, sir.

* * *

[230] THE COURT: All right, Mr. Campbell, where is the witness who was on the stand?

MR. BERENS: Your Honor, I would like to make a preliminary statement to the Court.

THE COURT: Yes.

MR. BERENS: We would like to withdraw our objection to the admissibility of the State's evidence on this delivery question. I have discussed this with Counsel. Mr. Corrigan and I had a discussion last summer, from which he believes this evidence should be admitted. There is no question in my mind as to how tightly the State should be bound by the stipulation on this point. I don't agree with

his memory of the discussion, except I believe that his memory is what he thinks it is, and so we are going to clear this difficulty out.

THE COURT: Very good.

MR. BERENS: I would like to make it clear, Your Honor, that we are reserving the legal arguments not on admissibility, but on the entrapment and the extension of the statute of limitations.

THE COURT: Very well. With that understanding, we will proceed.

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[231] Q. Now, on the original facilities in East Chicago, Indiana, can you tell us approximately how long the fuel remains in the storage facilities in East Chicago, Indiana, prior to transporting the same to Des Plaines, Illinois?

A. I would say probably an average of about ten days, ten to twelve days.

Q. And the distance from Wood River, Illinois, [232] to East Chicago, Indiana, can you tell us the approximate distance?

A. About 250 miles.

Q. Now, can you tell us what percentage of the fuel that is refined in Wood River, Illinois, is purchased by United Air Lines?

A. That will vary from 70 to 80 per cent.

Q. And would this indicate that the remaining 20 per cent is purchased by American Airlines and Delta, and other airlines you referred to?

A. No. What I was saying is that about 20 to 30 per cent of the fuel that is brought up to East Chicago actually comes out of Gulf Refineries in Louisiana and in Houston.

Q. Of the fuel that finds its way to the storage facilities in East Chicago, Indiana, what percentage of that fuel is purchased by United Air Lines?

THE COURT: You mean all the companies, the other ones that he just mentioned?

MR. CAMPBELL: Beg pardon?

THE COURT: You mean all the fuel that comes from places other than Wood River, that includes [233] those, too?

MR. CAMPBELL: No, Your Honor, I am trying—I will strike that question and rephase the question.

Q. Of the fuel that is stored in East Chicago, Indiana, what percentage of that fuel is purchased by United Air Lines, if you know?

A. About 40 per cent, I would say.

Q. How much is purchased by the American Airlines?

A. About 30 to 35 per cent.

Q. Would it be true that United is your largest customer of the fuel from East Chicago, Indiana?

A. That is correct.

Q. I don't think we established yesterday that the West Shore Pipeline is considered to be a common carrier?

A. That is correct.

Q. So that anyone may avail themselves of the service, provided the tariff is paid?

A. That is right.

MR. BERENS: Your Honor. I don't want to [234] interrupt your questioning, Counsel, but I think the witness is being confused by the use of the word "fuel" here.

If we could use turbine fuel, and so on . . . I'm not sure whether he is answering questions as to total fuel processed through East Chicago, including motor fuel and diesel fuel, and so on.

THE COURT: It might be well to straighten it out.

MR. CAMPBELL: All references are to aviation fuel unless otherwise indicated.

MR. BERENS: Aviation fuel again has two categories: Turbine fuel and aviation gas. Are you referring to both together?

MR. CAMPBELL: They would be grouped together and—

MR. BROMBERG: Off the record.

THE COURT: I think it would be well if you straighten it out.

THE WITNESS: I'm not sure I can recall these figures.

MR. CAMPBELL: Q. Would you indicate for the purpose of the record the types of aviation fuel [235] that is purchased by United from the storage facilities in East Chicago, Indiana?

A. Yes, they buy turbine fuel, which is essentially kerosene, and then they buy 100 octane aviation gasoline.

Q. Can you tell us which fuel is used for which planes, if you know?

A. Yes, of course, the turbine fuel is used for the jets, and the aviation gasoline is used for the piston engine airplanes.

Q. Now, the figure, I believe, you mentioned yesterday was 18—approximately 18 million gallons of turbine fuel.

A. Sold to United.

Q. Per month?

A. Right.

Q. What would be the approximate cost of this fuel in terms of dollars?

A. Can I use my slide rule?

Q. Yes.

MR. BERENS: Counsel, I hate to interrupt you, but when you said "cost," you mean selling price to United or cost to Shell?

[236] MR. CAMPBELL: Selling price to United.

THE WITNESS: It would be approximately $1,700,000.

MR. CAMPBELL: Q. One million seven hundred thousand?

A. Let me see if I have my decimal points in the right place.

Yes, that is approximately. I can't give it to you—

Q. $1,700,000 per month. Would this include the—is this just for the turbine or does it include the other fuel for the piston engine?

A. This is the turbine.

Q. Just for the turbine?

A. Yes, sir.

Q. Now, how many gallons approximately per month are purchased for the piston engine airplanes?

A. This is going down all the time as they get rid of piston engine airplanes, and I don't honestly know the number—the volume at this point.

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[242] Q. Under the terms of the lease, if you know, are the two airlines—that is, United Air Lines and American Airlines—obligated to purchase Shell fuel in order to use the storage facilities at Des Plaines, Illinois?

[243] A. We have the right under certain circumstances to cancel the lease if it isn't Shell fuel going—if it isn't fuel purchased from Shell going through there.

Q. Do you lease the entire facilities—do you lease the entire facilities owned by Shell Oil Company located at Des Plaines, Illinois, to either United or American Airlines?

A. Well, there are two terminals at Des Plaines on adjoining properties. There is the one terminal that is leased to United and American Airlines, and there is another terminal completely separated that is owned and operated by Shell for motor gasoline, fuel oil, and so forth.

Q. Would that include any aviataion fuel, the second terminal that you just—

A. The second terminal does include some aviation fuel which is bonded turbine fuel and it has just been put in there.

Q. What use is made of that turbine fuel?

A. This is for international flights, flights going outside of the country. It is brought into the country in bond.

[244] Q. Which airlines use that fuel, if you know?

A. Lufthansa, BOAC, Scandinavian Airlines, essentially all of the—all of the international carriers at O'Hare.

Q. This is the fuel located in the second terminal which is sold by Shell Oil to the airlines that you just mentioned?

A. Yes, sir.

Q. Where does that fuel come from?

A. That comes from—

Q. The source of that fuel?

A. That comes from Curacao. That is an island off of Venezuela.

Q. Is there any Shell aviation fuel delivered to Argo, Illinois?

A. No, sir.

Q. Are there any other types?

A. You mean Shell's terminal at Argo?

Q. Yes.

A. No, there is not.

Q. Shell does have a terminal at Argo, Illinois?

[245] A. Yes, sir.

Q. Are any fuels delivered from East Chicago, Indiana, to Argo, to your terminal at Argo, Illinois?

A. Not that I know. Most of them come directly from Wood River.

Q. To your knowledge, is there any further processing or refinement—refinement of the fuel after it reaches Des Plaines, Illinois?

A. No. The airlines—it depends on what you mean by "refining and processing."

The airlines mainly run quality control checks and filter the fuel to take out any extraneous material that may have gotten into it in pipeline shipment.

Q. Do you know who performs those tasks, whether it is the airlines or whether it is the—

A. It is the airlines' agent, Lockheed Terminal.

Q. Now, Mr. Maxfield, would you explain the procedure for the withdrawal of the fuel from the storage facilities at Des Plaines, if you know?

A. I'm sorry. I don't know. We don't operate that terminal.

[246] Q. According to Defendant's Exhibit No. 1, does the lease include certain pipelines running from Des Plaines, Illinois, to O'Hare Field?

A. Yes, sir, they do: Two six-inch pipelines.

Q. And they are leased by Shell Oil?

A. To the airlines.

Q. To United and American Airlines?

A. That's right, that's part of the facilities.

Q. I believe yesterday you were not certain as to the capacity of the storage facilities at Des Plaines in terms of the number—let us say—gallons or barrels that the leased facilities could hold.

A. No, they are outlined in the lease.

Q. Could you take a look at this lease and tell the Court the capacity?

A. There is two 120,000-barrel tanks; two 112,000-barrel tanks, and two 2,000-barrel tanks.

Q. Just for the record, how many gallons are there to a barrel?

A. Forty-two gallons.

[247] Q. Forty-two gallons. Are you generally familiar with the storage facilities there, the physical structure?

A. Generally, yes.

Q. On the two 120,000-barrel tanks, is there—strike that. On the two 120,000-barrel tanks, would fuel in both tanks belong to United and to American Airlines?

A. Yes, sir.

Q. In other words, United Air Lines does not use one tank completely and American Airlines does not use one tank completely?

A. No, they do not.

Q. Then would it follow that the fuel contained in any of these tanks at any time is owned by both United Air Lines and the American Airlines?

A. I would say that would be a fair statment; yes, sir.

MR. HOFF: Could I hear the answer?

(Answer read.)

MR. CAMPBELL: Q. Are you in any way familiar with what happens to the fuel after it leaves [248] Des Plaines, Illinois?

A. Well, in general, but not specifically. I don't know all of the operations specifically.

Q. Would you tell us what you do know about the fuel after it leaves Des Plaines, Illinois, from the stored facilities there?

A. Well, of course, it is transported over these two six-inch pipelines to O'Hare Field and the airlines have storage on O'Hare Field which is divided into what they call the primary storage. And from the primary storage then it is transported by pipelines down to what they call satellite storage which is just off of the aprons at the terminal. And then from there, why, there is a pipeline or hydrant system running around the various terminals, where they load the airplanes.

Q. Are all of these pipelines owned by Shell Oil—

A. No, sir.

Q. —up to the point of—

A. Only to the edge of O'Hare Field, from Des Plaines to the edge of O'Hare Field. From there on, we have no interest in the equipment at all.

• • •

[254] Q. Can you trace the delivery of the fuel for the piston engines to O'Hare Airport for the benefit of the Court?

A. Yes. United Air Lines send their common carrier truckers into our East Chicago Terminal and take delivery there, and then the common carriers deliver to O'Hare Airport.

Q. Do you know the names of the common carriers?

A. Generally speaking, it is Rogers Cartage that comes in to East Chicago.

Q. Does Shell Oil have any interest in Rogers Cartage, if you know?

A. No, sir.

Q. Do you know whether United has any interest in Rogers Cartage?

[255] A. I do not know whether they do or not.

Q. On the sale of the fuel for piston engines, Shell does not collect any use tax on these purchases?

A. No, sir. You mean from United Air Lines?

Q. Or American.

A. Well, American, we don't sell any gasoline—aviation gasoline to them.

Q. So this only applies to United?

A. Yes, sir.

Q. Now, when the fuel is withdrawn from the storage facilities at O'Hare Field, are you familiar with the manner in which the fuel is withdrawn from the storage facilities at O'Hare Field?

A. Well, generally, I have seen—I have seen the operation there. I am not involved in it in any way.

Q. You spoke about certain, I believe, pipelines and hydrants.

A. Yes, sir.

Q. That the fuel eventually finds its way into the plane.

A. Yes.

[256] Q. Can you explain how that is done, if you know?

A. Well, it is pumped in the pipeline from the primary storage down to satellite storage off the apron. Then it is

pumped from there through the hydrant systems into the hydrant systems and what they call a hydrant car is attached to that pipeline and also attached to the airplane and delivery is made by that method.

Q. Would this be Lockheed performing these functions, if you know?

A. Lockheed I know performs part of the functions, and I believe United performs part of the functions. But I'm not completely familiar of who does what.

Q. Do you know whether the fuel that finds its way into the airplane is in any way metered at that point?

A. Yes, I believe it is.

* * *

[258] Q. Do you sell aviation fuel to United Air Lines for flights out of Midway Airport?

A. Yes, sir. In that case, they pick up the fuel at East Chicago by a common carrier.

Q. What is the name of the common carrier?

A. Generally speaking, it is Rogers Cartage that picks up the fuel.

Q. Does Shell Oil use any trucks to transport aviation fuel to Midway?

A. No, sir.

Q. Does Shell Oil use any of their trucks to transport fuel on to O'Hare Airport sold to United Air Lines?

[259] A. No, sir.

Q. Is any fuel sold from Argo, Illinois, to Midway Airport to any of the airlines using Midway Airport?

A. Well, there is some motor gasoline and some fuel oil sold to the airlines, yes.

Q. On those transactions, do you collect the Retailers' Occupation Tax?

A. Yes, sir.

MR. CAMPBELL: One moment, please.

Q. Is there any processing of the fuel in East Chicago, Indiana?

A. No refining, processing. We settle the fuel in storage there because there is always a certain amount of contaminants that are taken as it is shipped up a pipeline and we settle it out and, of course, filter it.

Q. Now, just to review a part of your testimony, you have indicated that upon the receipt of the purchase order from Lockheed in your East Chicago, Indiana, premises, the fuel is delivered to the West Shore Pipeline.

A. The meter station at Hammond, Indiana, [260] yes.

Q. Yes, and that is located in Indiana?

A. That is correct, Hammond, Indiana.

Q. And the fuel is then transported to Des Plaines, Illinois, and to the premises that are owned by Shell Oil Company; is that correct?

A. The Des Plaines facility is owned by us and leased to the airlines; yes, sir.

Q. And also Shell Oil has pipelines that run from the Des Plaines facilities, I believe you—

A. They are part of the Des Plaines facilities, the pipelines to the edge of O'Hare Airport.

Q. Yes. So that apart from your contractual obligations, it would be possible for Shell Oil to deliver this fuel physically to O'Hare Airport, would it not?

A. Sure, it would be physically possible, yes.

• • •

[264] MR. CORRIGAN: Q. Mr. Maxfield, I show you Page 2—this is Defendant's Exhibit for identification No. 1, the lease which we are discussing, and I ask you to read to the Court the line section near the bottom of the page.

A. (Reading) "Except when and to the extent that Shell has consented otherwise in writing, the premises shall be used only for the storage and handling of—"

Q. That's "consented," isn't it?

[265] A. "Consented." I'm sorry.

". . . Shell has consented otherwise in writing that the premises shall be used for the storage and hadling and the pipelines only for the movement of aviation fuel purchased and received from Shell Oil at East Chicago, Indiana, herein called (Shell's aviation fuel), except when otherwise expressly specified lessee's obligations under the lease shall be joint and several."

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[268] MR. CORRIGAN: Q. You said that Pure had been a major supplier previously, had you not?

A. They had been a supplier. I wouldn't say "a major supplier."

Q. Until about when?

A. I believe they lost their contract about two years ago. I can't say exactly.

Q. Now, you have testified that not all of the fuel which is sold to United and American is refined at Wood River, is that correct?

A. That is correct.

Q. You have testified, I believe, that a portion of the fuel which is delivered—or is transported across the Shell pipeline from Wood River has been refined elsewhere; is that correct?

A. That's right, in Louisiana and in Houston.

Q. How is it delivered to Wood River from those locations?

A. By barge.

Q. It is then entered into the pipeline at [269] Wood River, is that correct?

A. That is correct.

Q. How is it segregated from the fuel which is refined at Wood River?

A. It isn't segregated.

Q. It is shipped in conjunction with the Wood River refined fuel across the pipeline, is that correct?

A. Yes, sir, that's right.

Q. And then it is stored, this fuel is all stored together at East Chicago prior to delivery to wherever it is delivered at least prior to sale to United and American; is that correct?

A. That is correct.

Q. Then it is not identifiable as a separate—as separate fuel from the Wood River refined fuel at any time subsequent to entering into the pipeline, is that right?

A. No, I wouldn't say so.

Q. Now, you mentioned the settling process which takes place at East Chicago. That is not a part of a processing, is it? That is simply—

A. No, this is just a quality control.

• • •

[274] EDWARD D. MAXFIELD

was thereupon called as a witness on behalf of the plaintiff, having been previously duly sworn, testified further as follows:

DIRECT EXAMINATION

BY MR. BERENS:

Q. Is it correct that as a result of your duties, you are familiar with Shell's refining facilities, pipelines, and delivery terminals in this country relating to turbine fuel and aviation gas?

A. Yes, sir.

Q. Directing your attention to the turbine fuel that has been under discussion here, could you identify the ultimate origin of that fuel in terms of where it comes from?

A. Well, in so far as East Chicago is concerned—

Q. Yes.

A. —the crude is taken out of the ground, of course, in West Texas and in Oklahoma. It is transported up over crude pipelines from there to Wood River. At Wood River, it is refined, put in [275] storage and then it is pumped by 250 mile Products Pipeline up to East Chicago; that is, part of the fuel. About 20 to 30 per cent is the crude that comes from either the Louisiana offshore wells or some Texas wells into refineries in either Houston or Norco. It is refined there into turbine fuel, stored, and then put into barges and shipped up the Mississippi River to Wood River, where it is there put into the storage for pipeline shipment up to East Chicago.

Q. Do I understand correctly that approximately 70, 80 per cent of the turbine fuel that arrives at East Chicago has been refined at Wood River and 20 to 30 per cent either at—or in combination at Houston, Texas, or Norco, Louisiana?

A. That is correct.

Q. The refinery runs at each of these refineries turn out these same specifications of the fuel?

A. Yes, they do.

Q. Do I understand correctly that the fuel from these three sources is commingled at Wood River?

[276] A. That is correct.

Q. Prior to shipment on the pipeline to East Chicago?

A. That is correct.

Q. The 70 to 80 per cent of refinery source at Wood River and the 20 to 30 from these other two sources, does this vary from time to time?

A. It will vary from time to time depending on our manufacturing facilities at Wood River.

Q. Did you state how the crude oil gets from West Texas to Wood River, the portion that doesn't come through Norco and Houston?

A. It comes up by pipeline from West Texas up to Cushing, Oklahoma, by various pipelines—crude pipelines. And then from Cushing, Oklahoma, there are two crude pipelines, one owned entirely by Shell, and another one that is jointly owned with the Texas company that brings the crude from Cushing, Oklahoma, to Wood River.

• • •

[280] Q. Does all of the Wood River production go to East Chicago? Does all of the Wood River production of turbine fuel go to East Chicago?

A. No, it does not. We have—we barge some of it up to St. Paul-Minneapolis, and we have what we call our East Product Line runs out to Cleveland, Indianapolis, and Cleveland, and then from East Chicago, we have distribution to—by pipeline over into Michigan and in up into Wisconsin, and, of course, some deliveries by truck into Northern Indiana.

Q. Of the fuel, of the turbine fuel that comes to East Chicago, approximately what—I [281] will strike that.

Of the turbine fuel that comes to rest in East Chicago, approximately what percentage goes to these points like Michigan, and Indiana, and Wisconsin that you just mentioned?

A. Oh, about 12 per cent.

Q. It has been established that the turbine fuel comes from Wood River, the commingled turbine fuel comes from Wood River to East Chicago by pipeline. Would you give the diameter of that pipeline?

A. That's a fourteen-inch pipeline.

Q. And from East Chicago, the fuel goes by pipeline, West Shore Pipeline to the Des Plaines breakout area. Could you give the diameter of that pipeline?

A. That's a sixteen-inch pipeline.

Q. A sixteen-inch pipeline?

A. Yes, sir.

Q. Would it be possible physically and technically to pump from Wood River through your fourteen-inch pipeline on to the sixteen-inch pipeline of West Shore without coming to rest at East [282] Chicago?

A. No, sir.

Q. Would you explain why not?

A. Well, in the first place, it is a different diameter pipeline. There are also—also there are many shippers in West Shore Pipeline and West Shore could not schedule receiving of product at our convenience of the tenders that are shipped over our North Products pipeline. It would be fortuitous if we could pump directly into there. But you could never depend on it, and you will find in any pipeline operation where there is a transfer from one pipeline to another, there are storage tanks there in order to—for it to come to rest so they can schedule it out.

Q. Do you know of any instances anywhere where there is continuous piping from a proprietary line of one diameter to a common carrier line of another diameter?

A. I don't know of any.

Q. Of any kind of fuel, not just turbine fuel.

A. No, I don't know of any.

[283] Q. Would the quality control of this turbine fuel be affected if there wasn't the settling out at both East Chicago and at Des Plaines?

A. Oh, yes. This is very much a requirement as far as handling the fuel to settle it out at each point it comes to rest.

Q. Do I understand then that two settling outs are better than one?

A. Absolutely.

• • •

[286] Q. Is it physically possible today to deliver fuel by pipeline—let me restate that.

Is it physically possible today to deliver turbine fuel by pipeline direct from Wood River to O'Hare Field?

A. No, it is not.

Q. Has it ever been possible physically to do so in the past?

A. Not to my knowledge.

Q. Would it be economically feasible now or—

A. It would be—

Q. I didn't finish my question.

A. Oh, I'm sorry.

Q. Would it be economically feasible now or in the future, foreseeable future to deliver turbine fuel from Wood River to O'Hare without it coming to rest at your East Chicago terminal?

MR. BROMBERG: I object, unless the witness will state the foundation, the basis for his opinion.

There has been no foundation laid for it [287] at all.

THE COURT: Objection will be overruled. He has been asked everything he can think of about the operation of this.

MR. BROMBERG: The point is he would be engaging in an answer which he already started to give, what figures would be employed. I mean to give an economic judgment would have to be based on a foundation of figures, none of which have been adduced before this Court.

THE COURT: I think that on the basis of the experience which he seems to have quite a little bit of, he may answer the question, sir.

THE WITNESS: It would require, it would require a large expenditure to extend our pipelines up to Des Plaines. Something over two million dollars would have to be expended to do that.

MR. BERENS: Q. And this would be a duplication of facilities at West Shore or other common carriers now owned?

A. Yes, sir.

Q. If you had to spend two million or more dollars to extend your pipeline to the Des Plaines [288] area, in effect, would you have to charge more for the fuel in order to recoup this investment?

A. We would have to recoup the investment.

Q. In effect then, your airline customers would pay for the extension of the pipeline?

A. Yes, sir.

Q. Do you have any opinion whether they would continue to be airline customers if they had to pay?

MR. CAMPBELL: That we object to.

THE COURT: Objection will be sustained.

MR. BERENS: Q. I understand from your testimony this morning which—strike that.

Your Honor, there was this problem this morning on questions that seemed to be in terms of fuel without distinction from turbine fuel. I would like to spend a little time trying to clarify that.

THE COURT: I thought we tried to clarify it a little this morning perhaps.

MR. BERENS: My colleagues don't think I succeeded.

THE COURT: Go right ahead.

[289] MR. BERENS: Q. As I understand your testimony this morning, you stated that of all the fuel refined at Wood River, all the products, 40 per cent was ultimately sold to United and 30 per cent to American for ultimate delivery at O'Hare; was that correct?

A. Not of all the fuels manufactured at Wood River, but all of the turbine fuels manufactured at Wood River.

Q. What is the percentage of the refinery runs approximately at Wood River that constitute turbine fuel?

A. Approximately twelve per cent.

Q. And the balance is other types of products not connected with aviation gas?

A. That is correct.

THE COURT: Let me see if I understand. Twelve per cent of Wood River is turbine fuel?

THE WITNESS: Yes, sir.

MR. BERENS: Q. And the balance of products other than turbine fuel?

A. That's correct.

Q. Then to tie this together once more, 70 [290] to 80 per cent of the turbine fuel that eventually ends up at O'Hare comes from Wood River, and this is 70 to 80 per cent of the 12 per cent of the refinery runs at Wood River?

A. That is correct.

Q. I hope I've got that now.

Do I also understand correctly that this morning you testified that of the turbine fuel that you own at East Chicago derived from Wood River, from Norco and from Houston, that about 12 per cent goes to Michigan, Indiana and Wisconsin?

A. That is correct.

Q. And the balance goes to O'Hare and Midway?

A. That's correct.

THE COURT: We have already—I thought it was 82 per cent. Maybe I just—

MR. BERENS: I don't know.

THE COURT: I am trying to catch up.

MR. BERENS: Q. Is 12 per cent the correct figure?

A. About 12 per cent goes to other places other than the two airports—Midway and O'Hare.

[291] THE COURT: Okay.

MR. BERENS: Q. You also testified that a portion of the turbine fuel refined at Wood River doesn't go through East Chicago at all, but goes to points up the Mississippi.

A. Like Indianapolis, Cleveland, and so forth.

Q. All right, all right. Now, turning for a moment to East Chicago, of the total fuel volume handled there of all fuels, what percentage is turbine fuel?

A. About 30 per cent.

Q. What is the total storage capacity in gallons or barrels for all products, all liquid products at East Chicago?

A. About 2,600,000 barrels, give or take 20,000 barrels. I believe—I believe I have the figures here.

2,629,000 barrels total storage.

Q. And of this figure, how much is for the storage of turbine fuel?

A. 460,000 barrels.

Q. Could you convert that into gallons, that [292] 460,000?

THE COURT: Multiply it by 42, I suspect.

THE WITNESS: That is exactly right. 19,200,000 gallons.

MR. BERENS: Q. Of the turbine fuel at East Chicago sold for eventual use at Midway or O'Hare is all of that sold to United?

A. No, it is not.

Q. About what percentage is sold to United?

A. About 60 per cent.

Q. And the balance of 40 per cent is sold to American Airlines?

A. That's right. There is a small amount sold to the Lake Central also.

* * *

[295] Q. Are the shipments to United commingled with the fuel being shipped to American?

A. They are. Maybe I don't understand your question.

MR. BROMBERG: If the Court please, I think the answer was complete there.

MR. BERENS: All right. Prior to the shipment—is it—prior to the shipment to American and United, is the fuel commingled?

THE WITNESS: Yes, it is.

MR. BERENS: Q. Does it remain commingled at the time of pumping to West Shore?

A. Yes.

THE COURT: Do I understand by that, Mr. Maxfield, that if in handling you put in six million to United and four million for American—

THE WITNESS: It is a continuous pumping.

THE COURT: That's right, like pouring two glasses of water together?

THE WITNESS: Right, and, of course, at East Chicago, we don't—it is just one big bowl of [296] kerosene.

THE COURT: In other words, it is not divided.

MR. BERENS: Q. Prior to East Chicago, is the fuel identified or commingled as to any customer?

A. It is not identified as to any customer.

Q. This morning you testified, I believe, that on the average, the turbine fuel is in storage in East Chicago ten to twelve days. Is there any variation in this average from time to time?

A. Yes, that can vary depending on how full the tanks are at East Chicago when the shipment comes up from Wood River. So that could—I guess we could say that the fuel can be there from anywhere from five—part of the fuel could be there anywhere from five to twenty days.

THE COURT: Would it also be dependent on the request from Lockheed to send the gasoline out?

THE WITNESS: No, it would depend more on our ability to manufacture it and—because this can vary from time to time and sometimes we run awfully close the way they take this volume.

MR. BERENS: Q. When do you receive the shipping orders from Lockheed on behalf of United?

[297] A. It's about the tenth of the month preceding the shipments that the—in other words, on February 10, for March shipment.

Q. And this is for the three March shipments?

A. That's correct.

Q. And are these shipments at particular dates of the month?

A. Generally, the 10th, the 20th, and the last of the month.

Q. You said the end of the month. Can I clarify that? Is it the 10th, 20th, and 30th of the succeeding month, or the 1st, 10th, and 20th of the succeeding month?

A. I beg your pardon. It is the 1st, 10th, and 20th of the following month.

• • •

[302] Q. Where does United place the order—orders for the turbine fuel for O'Hare and for Midway? At what office of your company?

A. At our East Chicago office.

Q. Are these orders in writing or orally?

A. The orders—the 10th of the month orders for the following month are in writing.

Q. For the turbine fuel?

A. For the turbine fuel. However, they can be corrected up to the last minute, essentially the last minute before shipment orally, sometimes confirmed in writing, but not always.

Q. So an order of February 10, for March 1, could be corrected any time prior to shipment by an oral correction?

A. Yes, sir.

Q. Are the orders for turbine fuel for Midway placed orally or in writing?

A. I honestly am not familiar with the [303] methods that are used there, but I believe it is orally.

Q. Are the orders for aviation fuel for O'Hare in writing or orally?

A. Aviation?

Q. Aviation gas, yes, sir.

A. I believe that's orally, too.

Q. And aviation gas at Midway?

A. The same.

Q. These are all placed here at your East Chicago office?

A. Yes, sir.

Q. Do these orders specify the quantity to be sold? Strike that.

In addition to the quantity to be sold and the date or dates of delivery, do these orders specify the place of delivery?

A. Well, in the case of turbine fuel, they specify delivery to West Shore Pipeline.

Q. And in the case of aviation gas?

A. To the particular common carrier that will be picking it up.

Q. Where?

[304] A. At East Chicago.

Q. At your truck terminal?

A. Yes.

Q. Did you testify this morning as to whether you carry insurance on any of this turbine fuel or aviation gas after it is delivered to either the pipeline or the trucking common carrier?

THE COURT: He did.

THE WITNESS: Yes, I did, and we do not carry any insurance.

THE COURT: I'm sure on the facilities and the buildings.

MR. BERENS: Q. Who arranges, if you know, for the tender of shipment on the West Shore Pipeline Fuel Company for turbine fuel?

A. United Air Lines.

Q. Who is the shipper, if you know?

A. United Air Lines.

Q. Does Shell prepay or otherwise pay for the transportation of the fuel on West Shore?

A. No, they do not.

Q. You testified this morning, I believe, [305] that Shell Oil had one director on the Board of Directors of West Shore Pipeline Company.

A. That's correct.

Q. If you know, how many directors are there of West Shore Pipeline Company?

A. Ten directors.

Q. And you testified, I believe, yesterday that Shell Oil has no nominee officers on West Shore Pipeline Company.

A. That's correct.

THE COURT: That's right.

MR. BERENS: Q. Do you have any—apart from not having officers, do you have any other management responsibility on a day-to-day basis with West Shore Pipeline Company?

A. No, sir.

Q. Do you know who does have the day-to-day managing responsibility?

A. American Oil Company.

Q. Has there been any rotation of this management responsibility since West Shore commenced shipping around the end of 1963?

A. No, there was not.

[306] Q. American has had it from the outset then?

A. Yes, sir.

Q. I believe you established this morning that the aviation gas shipments to O'Hare and to Midway and the turbine fuel shipments to Midway were made by the Rogers Trucking Company.

A. Rogers Cartage primarily this is . . .

Q. Do I remember correctly that you stated that Shell Oil has no ownership or management interest in Rogers Cartage Company?

A. That is correct.

Q. Do you know the names of any other of the common carrier trucking companies that may pick up fuel for United?

A. No, I do not.

Q. On these shipments for—do you know who the shipper is?

A. United Air Lines.

Q. Do you know who arranges for these shipments?

A. United Air Lines or their agent.

Q. Does Shell prepay or otherwise pay Rogers for this transportation?

[307] A. They do not.

Q. Now, has any of this ordering—strike that.

For the turbine fuel, how often do you invoice United in reference to each of these shipments?

A. Immediately after each shipment.

Q. From which office of Shell is this invoice sent?

A. From Indianapolis.

THE COURT: Indianapolis?

THE WITNESS: Yes, sir.

MR. BERENS: Q. And it is sent to United where?

A. At their main offices in Des Plaines.

Q. Do you know whether they pay these invoices as each is sent, or do they accumulate them for awhile?

A. I believe they pretty well pay them within ten days after invoicing.

Q. Does Shell give them a discount for payment within ten days?

A. Yes, sir.

[308] Q. Which office of Shell receives these payments?

A. I could be corrected on this, but I believe it is in our New York data center where the payments are made.

Q. Referring to your testimony, Mr. Maxfield, as to the ordering procedure, the delivery procedure, the shipping arrangements for all of this fuel—turbine fuel and aviation gas both for O'Hare and for Midway—has any of this changed since July 1, 1963?

A. No, sir.

Q. Has any of it changed since January 19, 1966?

A. No, sir.

MR. BERENS: That is the date, Your Honor, of the stipulation.

THE COURT: I know that.

MR. BERENS: Q. If you know, could you indicate the year in which Shell commenced selling—I suppose it is aviation gas to United for delivery at Chicago Airport?

THE COURT: Wait a minute. Chicago Airport?

[309] MR. BERENS: I will strike that.

THE WITNESS: Or East Chicago?

MR. BERENS: I was having much trouble getting this.

Q. If you know, what year did United start purchasing aviation gas from Shell for this area?

A. I believe it was 1945 or '46. Whether it was '45 or '46, I'm not sure.

Q. And since that date, has the delivery always been from—delivered to United at your East Chicago terminal, as far as you know?

A. No, sir, it has not.

Q. When did they commence—when did Shell commence delivering from your East Chicago terminal?

A. In 1953.

Q. Now, directing your attention, Mr. Maxfield, away from operating procedures to some historical development of Shell's facilities, when did Shell build or acquire the refinery at Wood River?

A. They acquired the Roxanna Petroleum Company, which was operating a refinery in Wood [310] River, about 1916.

Q. Did you say 1960 or 1916?

A. '16, 1916.

THE COURT: I went to . . .

(Discussion had off record.)

MR. BERENS: Q. And the refinery existed at that time?

A. That's correct.

Q. And Shell has operated continuously since?

A. Yes, sir.

Q. In 1916, did Shell have any facilities in East Chicago?

A. No, they did not.

Q. When did they build or acquire those facilities?

A. Well, in 1928, a refinery was built in East Chicago and in—and at the same time or about the same time, why, a crude pipeline from the Wood River area was run up to East Chicago.

In 1938, because of some economic reasons, we decided to dismantle the refinery at East Chicago and concentrate all our refining at Wood River. [311] And the pipeline from Wood River to East Chicago—the crude pipeline from Wood River to East Chicago was converted to a products pipeline.

And after that, East Chicago was used purely as a storage terminal.

Q. So East Chicago has been a storage terminal since 1938, is that correct?

A. That is correct.

Q. And since that time, it has handled—has it handled the full range of petroleum products that you distribute?

A. Yes, sir.

• • •

[313] MR. CAMPBELL: Q. By way of the West Shore Pipeline, it is possible for you to deliver the turbine fuel directly to O'Hare Field, is that not correct, from Wood River?

A. Not on a continuous basis.

Q. Well, the fuel comes to rest in East Chicago, Indiana.

A. That is correct.

Q. And at that point, it still belongs to Shell Oil?

A. Yes, that's right.

Q. And it is possible for you to deliver this fuel from East Chicago, Indiana, directly to O'Hare Field, is that not correct?

A. It would have to come to rest again in a facility like the Des Plaines facility.

Q. Ultimately, you could deliver the fuel [314] directly to O'Hare Field, is that correct?

A. Yes, sir.

MR. CAMPBELL: No further questions.

MR. BERENS: Just one further question, Your Honor.

REDIRECT EXAMINATION

BY MR. BERENS:

Q. I believe my question was answered. And if it wasn't, I am going to rephrase it.

Can you deliver turbine fuel from Wood River to O'Hare whether through the West Shore Pipeline or elsewhere without having it come to rest at East Chicago?

A. And my answer was that we couldn't.

Q. You could not?

A. Could not.

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[321] JOHN H. STARK,

was thereupon called as an adverse witness under Section 60 of the Civil Practice Act, having been previously duly sworn, was examined and testified as follows:

• • •

[323] Q. Can you tell me if United Air Lines has any

employees at the storage facilities in East Chicago, Indiana?

A. We do not.

Q. Do you know if United Air Lines pays any sales tax to the State of Indiana on the purchases of the fuel that is involved in this lawsuit?

A. To the best of my knowledge, there are no sales taxes in the State of Indiana, and I am not [324] familiar with any sales taxes that we pay in Indiana.

Q. Would the same apply for any use tax paid to the State of Indiana?

A. Again, sir, I don't believe there is a use tax. If there is, we have not been paying Indiana a use tax.

Q. Now, the purchase by United of the turbine fuel and the aviation fuel involved in this lawsuit, do you know whether there is a sales or use tax paid to any state on the purchase by United from Shell Oil Company of the fuel?

MR. BERENS: Objection, your Honor. We do not believe this is relevant to the inquiry.

THE COURT: I don't know whether it is or not. Perhaps it might be well to limit it to Illinois. Although, it might be of some relevancy if they paid a tax in some other state.

You mean on the fuel that is purchased in East Chicago?

MR. CAMPBELL: Yes.

THE COURT: Or Hammond, wherever it is?

THE WITNESS: I am to proceed, sir?

THE COURT: Yes.

THE WITNESS: A. In the instance in the State of [325] Illinois we pay the sales tax on deliveries going to Moline, Illinois.

In the instance of fuel going to—I am trying to think of these states one at a time, sir.

In the instance of fuel going to the State of Michigan,

we pay a Michigan state sales tax on the fuel trucked into the Michigan points.

MR. CAMPBELL: Q. Perhaps you misunderstood the question, Mr. Stark.

This only related to the fuel that is purchased from Shell Oil Company and delivered to the West Shore pipeline in Hammond, Indiana.

A. Oh.

The answer then, sir, is that all of the fuel going into the West Shore Pipeline arrives at O'Hare Field, virtually all of it.

Q. There is no sales or use tax paid to any state on that particular fuel?

A. Not to the best of my knowledge, sir.

Q. Would the same be true of the aviation fuel that is delivered by truck from East Chicago, Indiana?

A. That is correct.

• • •

[327] Q. Once the turbine fuel is delivered to the West Shore Pipeline—

A. Yes, sir.

Q. (Continuing)—does United carry any insurance [328] on the fuel while it is in the pipes?

A. No, sir. We are self-insured on product.

However, West Shore is responsible to us as the carrier. The tariff provides that they have to deliver to us substantially the amount of fuel they receive.

Again, I believe Mr. Maxfield brought up the fact, that there is a hard cut. We do not take out of the—at Des Plaines as much as we put in at Hammond, because we want to preserve the integrity and the quality of our turbine fuel. So they cut off on the front end.

If I might give you an example, moving down the pipeline, immediately in the distillate range of fuels, kerosene,

heating oils, numbers 1 and 2, in order to preserve the integrity of our turbine fuel, No. 2 oil immediately precedes our slug or tender of turbine fuel. And immediately behind it is a No. 2 fuel oil introduced by another shipper on the line.

In order to preserve the integrity of this high quality product that we have, there is bound to be a slight amount of interfacial mix as one product pushes the other.

[329] So in order to preserve the integrity here on the front end, we take a cut off the front end of the turbine fuel above the magnitude of 150 to 175 barrels, similarly some off the back end.

Q. This means that the West Shore Pipeline has some type of a credit provision for—

A. Yes, sir.

Q. With United?

A. At the end of the month, West Shore Pipeline credits us. They publish an amount that they pay and they credit us with the amount of fuel that was short on our delivery at Des Plaines as compared to what was introduced at Hammond.

Q. Do you know if you are the largest shipper on the West Shore Pipeline?

A. No, I do not think we are, sir.

There are—

Well, I have no way of knowing, I am not a Director of West Shore. We are a shipper on West Shore. I would think that probably the largest oil company in this marketing area, namely American Oil, would be the largest shipper. But this would be a matter of conjecture on my part. I could not positively state this.

[330] Q. Now, American Air Lines also ships fuel through the West Shore Pipelines, is that correct?

A. Yes, sir, they do.

Q. And both the American fuel and the fuel belonging to United is stored in the Des Plaines facilities?

A. Yes, sir; however, is separately shipped, the two—

Q. Once they arrive at Des Plaines—

A. The two abut each other when they leave the Hammond terminal. United's fuel precedes, American's follows directly behind.

Q. Once they arrive at Des Plaines they are still together?

A. Yes, sir. It is common specification. It is known as U.A.3.

Q. They are the same grade and quality, is that correct?

A. Yes, sir.

Q. And they are stored in the same tank?

A. Yes, sir.

Q. And there is no separation or segregation as to the fuel?

A. It is the same at O'Hare Field, too. Once we [331] get the fuels onto O'Hare Field, even though one oil company may supply—in the instance of American Oil I believe they supply five airlines on O'Hare, all the fuel of all five airlines is co-mingled because it is common specification. And Lockheed Air Terminal, the agent for the airlines, do the accountability as it relates to the receival of the product for each individual airline and the accountability thereof on for each airline.

Q. So that if I understand you, they are co-mingled, the fuel is—

A. Yes. Once they arrive at Des Plaines, they are co-mingled until the fuel gets downstream to the satellite area. The satellite tanks are located around the periphery of the terminal, and when the fuel flows into the satellite areas, United has satellite areas Nos. 2 and 3. We have 650,000 gallons of storage capacity in that area.

Q. If you will just hold it one moment, we will get to that point.

A. Oh.

Q. I wanted to ask you if by chance United Air Lines, the plaintiff here, has any employees at the Des Plaines storage facilities?

[332] A. No, sir.

We hired Lockheed to act as our agent and perform the necessary services there.

Q. Do you know whether American Air Lines has any employees at the storage facilities?

A. No, American do not either.

We have a contract with Lockheed to perform these services for us.

Q. While the fuel is in the storage facilities at Des Plaines, do you know if United Air Lines insures the fuel there?

A. We are self-insured, sir. However, we do have a blanket policy. If we have a loss of United's—any of United's owned property anywhere over the country, anything over a $10,000 loss, Employers Group of Boston, I believe is the underwriter, that would protect us over $10,000.

Q. Do you know if United is responsible for the repairs of the storage facilities at Des Plaines or not?

A. I do know it and we are.

Q. I didn't hear that.

A. I say I do know it and we are responsible, sir.

[333] Q. That is along with American Air Lines, is it?

A. Yes, sir, yes. We paid several thousands of dollars in repairs last year, sir.

Q. Now, would you explain the procedure for withdrawal of the fuel from the storage facilities at Des Plaines, Illinois?

How is this accomplished?

A. Yes, sir.

If you recall, Mr. Maxfield advised that there was approximately 15 million gallons of storage at the Des

Plaines terminal, two 120,000-barrel tanks and two 112,000-gallon tanks.

The 120,000-barrel tanks are used for receival off the Badger line.

Once the fuel is pumped up into the 120,000-barrel tanks, we go through a quality control—I say we, I am speaking of our agent, Lockheed, goes through a quality control arrangement.

The fuel flows through—well, they are sort of like cream separators. They are called Doore-Clone centrifugers, and the fuel spins through these centrifugers down through diatomaceous clay filters; then through quality control checks. Once through a go-no-go device, another known as a [334] microscan read-out, and once the fuel has passed through this quality control, it is pumped up into the two 112,00-barrel tanks.

It is now ready for its trip down to O'Hare Field.

The fuel is pumped through two 6-inch lines. We have a 100 horsepower pump and a 40 horsepower pump driving the fuel down to O'Hare Field.

Arriving at the edge of O'Hare Field, all of the facilities on the airport itself are owned by the City of Chicago.

We, the signatory airlines, the fourteen signatory airlines, that guaranteed the revenue bond issue of some 8 million dollars to build this system, we have taken a 40-year lease on the facility until the year of 2,002.

The fuel flows into the primary tank farm area. The primary tank farm area has a group of tanks, some are 11,700 barrel, some are 10,300 and the balance of them are 4,000 barrel capacity.

The fuel of American and United comes down the two 6-inch lines into the four 11,700-barrel tanks. Converting that to gallons, it is approximately [335] 2 million gallons.

And as it flowed into the primary tank farm, the fuel again passed through diatomaceous clay and through a

Warner-Lewis filter separator up into the tankage. This tankage is approximately 2 million gallons.

United's daily off-take on O'Hare is of the magnitude of 600,000 gallons per day. American is running about slightly over 300,000 per day. So the 2 million of storage facilities is sufficient for about two days' requirements on the field.

Then downstream of the primary tank farm down to the seven satellites that I told you there were around the periphery of the terminal, we have eight pipelines. In all there are 43 miles of pipe lining on O'Hare, but these eight principal pipe lines run from the primary tank farm down into what is known as the Group 1 manifolding area.

The fire station at the periphery of the airport is where —across from the fire station at the periphery of the tank farm road is this satellite area No. 1. This is a truck fill stand where certain fuels are put into refueler trucks for fueling.

[336] The balance of the fuel is manifolded and goes to the satellite areas. And the seven satellite areas have capacity of about two million gallons.

Q. Of the fuel that is put in the trucks that you just mentioned, the fuel is transported to the planes, is it?

A. In the instance of United, the bulk of the fuel that we put into our aircraft goes down to satellites 2 and 3, this 550,000 gallons of storage I told you of, and it is piped out under the wings of the aircraft and up into the aircraft.

Only out-of-gate position aircraft would be fueled from refueler trucks.

Q. Who do the trucks belong to that you have reference to?

A. The refueler trucks that United uses for aviation gasoline and the one or two that we do have for turbine, if the airplane is out of position, we lease from Shell Oil Company.

* * *

[341] THE COURT: I think the way you phrased the other question, Mr. Campbell, is probally better, having control of it. If you use the word control in the form of the question, all right. Physical possession is a little hard to define.

[342] MR. CAMPBELL: Well, we will withdraw the question.

THE COURT: As Mr. Maxfield pointed out, you do not carry it around with you.

MR. CAMPBELL: We will withdraw the last question.

Q. The control trucks that you spoke about—

THE WITNESS: A. The what, sir?

Q. I believe you mentioned the term control trucks.

A. No, I talked of the hydrant trucks under the wings.

Q. Pardon me.

A. Yes, sir.

Q. Can you explain who is the owner of the hydrant trucks?

A. We, the fourteen signatory airlines.

The fourteen airlines on O'Hare Field entered into a contract in 1958 with Lockheed Air Terminal to operate, manage, do the accountability of fuel and the maintenance of the fuel system.

Lockheed also were charged with the responsibility in that contract to the fourteen signatory airlines to buy the hydrant trucks and provide them to the airlines in order that the airlines [343] might provide their own in-to-plane service.

The trucks were to be amortized over a six-year period of time, and we amortized them this month. So the hydrant trucks are owned by the fourteen signatory carriers as of February.

Q. Sir, do you know if all of the trucks are used interchangeably with the—all of the parties who signed this agreement?

A. Not quite, Mr. Campbell.

Each airline has an assignment of trucks and pays proportionately according to their assignment.

Q. How many are assigned to United?

A. I was getting to that, sir.

We, United, have seventeen trucks assigned to us.

Out of the total of 61 on the field, 53 are on permanent assignment to the involved ten airlines that have the underground systems, the remaining eight are called pool carts and if one of our hydrant carts were to break down, we would phone Lockheed and within fifteen minutes they would deliver a pool cart to us and pick up the disabled cart, taking it back to their headquarters and putting it in shape and then returning it to our [344] service.

Q. Can you tell us the—strike that.

What financial arrangements do you have with Lockheed relating to the fuel that you have—the loading and transportation of the fuel that you have just mentioned?

A. As it relates to United and American, United and American have two agreements with Lockheed. Number one is the Des Plaines agreement, where Lockheed manages, controls and operates the Des Plaines facility for us, and we pay them—we pay them of the magnitude of—jointly, that is, we pay them in excess of $3,500 a month for managing the Des Plaines tank farm area.

Now, moving down on to O'Hare Field, as it relates to United, American and the other carriers, we, the fourteen airlines, signatory airlines, took a 40-year lease on this 8 million dollar fuel complex of the City of Chicago.

Once we took a 40-year lease, we then appointed—we invited proposal to bid back years ago, and Lockheed by competitive bid became our agent.

We then drafted an agreement with Lockheed [345] for the operation of this system as it related to all the carriers. Then we, the fourteen signatory carriers, sat down and

worked out an arrangement that was called an agreement among participating airlines, where we set up the charges as they related to Lockheed's operation.

But on O'Hare Field itself, Lockheed are the agents of all of the domestics, plus Pan-Am and Air Canada.

When I speak of the fourteen signatory, I am speaking of twelve domestics, plus Pan-Am, plus Air Canada.

Q. How much is paid for services rendered on the O'Hare complex to Lockheed by United, if you know?

A. Our payments to Lockheed on O'Hare Field are of the magnitude of—I have to draw from memory on this, sir, of the magnitude of a third of a million dollars a year.

Q. That is for United Air Lines only?

A. United only, yes, sir.

Q. Do you know whether United Air Lines pays any of the employees of Lockheed?

A. No, sir. Lockheed's employees are on their [346] own payroll, sir.

Q. Where is the fuel obtained for the intrastate flights?

MR. BERENS: Could you indicate which fuel you are talking about?

MR. CAMPBELL: I will strike that question, Counsel.

MR. BERENS: Yes.

MR. CAMPBELL: Q. Is any turbine fuel used on intrastate flights, if you know?

THE WITNESS: A. Generally not, Mr. Campbell, unless a Viscount were to have been substituted for a DC-6.

At the present time we are flying DC-6's into Moline, and there isn't much of a community of interest between the two cities. It is just a few flights a day.

Q. You used the term—generally, if the turbine fuel were used on intrastate flights, where would it be obtained from?

A. From this facility.

Q. From Des Plaines?

A. Yes, sir.

Q. And it would follow the same procedures [347] as the fuel used in the interstate flights?

A. Yes, sir.

• • •

[350] MR. CAMPBELL: Q. Can you explain the procedure in the aviation gasoline, the delivery or the placing of the order?

THE WITNESS: A. You mean for O'Hare Field from Indiana?

Q. Yes, sir.

A. Yes, sir.

Back in 1953 we entered into a contract with Rogers Cartage Company to act as our exclusive trucker—Rogers Cartage Company to act as our exclusive carter of bringing product into the airport serving this area.

Back in those days, of course, it was only Midway because O'Hare wasn't activated until October 1, 1955.

In the instance of Rogers, we order the fuel, as Mr. Maxfield told you, I believe, on Friday, we order the fuel by phone call to East Chicago.

Q. Is this order placed by Lockheed?

[351] A. In the instance of O'Hare, it is ordered by Lockheed. In the instance of Midway, I believe it is ordered by our agent down there, who is Butler Aviation.

Butler Aviation provide us in-to-plane fueling service at Midway, and they order our fuel as required for Midway. The fuel order was placed at the pipeline terminal of Shell at Hammond, and Rogers Cartage Company picked the fuel up for us, delivering it either to our facilities at Midway or our facilities at O'Hare Field.

Q. Do you know whether Rogers Cartage has an Illinois office?

A. Yes, sir, they do. I think they are at 103rd and

Charles or 103rd and Church. They are out in Beverly. They also have offices in Indiana.

Q. Does United Air Lines own any storage facilities at Midway Airport?

A. Yes, sir, on the airport we do.

We own two 25,000-gallon tanks for the storage of turbine fuel. We own one 25,000-gallon tank for 100-130 avgas, and we have a 10,000-gallon tank for automotive gasoline for our ground vehicles on the airport itself.

[352] Off the airport we have de-activated storage.

Q. Does Rogers Cartage deliver the—transport the fuel in the case of Midway to the employees of United at Midway Airport?

A. To the agents of United, Butler Aviation, who accept the fuel for us at Midway.

Q. You do not transfer any fuel from O'Hare Airport to Midway?

A. No, sir.

MR. BERENS: Excuse me. Reporter, could you read that last question and answer back, please.

(The record was read.)

MR. CAMPBELL: Q. On the metering system that you have testified to at O'Hare Airport, what happens when the reading is taken and by whom it is taken?

THE WITNESS: A. Lockheed Air Terminal as the agent for the fourteen signatory airlines, according to their agreement with the fourteen signatory airlines, have the responsibility to receive all the fuel and go through the fuel accountability of it, the accountability is performed by Lockheed.

Q. Lockheed bills United separately?

[353] A. Lockheed bill all the carriers according to the services that are performed for them.

THE COURT: You mean for their services or for the gasoline?

MR. CAMPBELL: For the metering service.

THE COURT: Oh.

THE WITNESS: No. It is a part of the overall service to all fourteen carriers.

Every night at midnight on O'Hare Field the Lockheed people do what is termed a read-out, and they go around and check all of the metering facilities at all of the individual carriers and then they provide the individual airlines with the number of gallons that were drawn from the facility as it related to that carrier.

* * *

[358] MR. BERENS: Q. For the calendar year 1967, Mr. Stark, would you give us in round figures the total purchases by United from all sellers of turbine fuel for United's whole system?

THE WITNESS: A Turbine fuel only?

Q. Yes.

A. It is of the magnitude of 1,243,000,000—may I again refer to a note?

Q. Yes, you may.

A. 1967 turbine fuel, 1,243,918,497 gallons.

Q. Do you have the figure for aviation gas?

A. I do. It was 61,675,503 gallons.

Q. Now, are these quantities supplied entirely by Shell Oil?

A. Oh, no, sir. Shell supplies approximately 25 percent of the turbine fuel, and a little more than that of the aviation gasoline.

[359] We have six other principal suppliers in the United States. No single oil company is capable of producing the amount of fuel required by United.

Q. Again for the year 1967, what was the total gallonage of turbine fuel purchased by United from Shell from all of these 43 or so points?

A. About 320 million.

May I again refer—

Q. Yes.

THE COURT: Is this turbine?

MR. BERENS: Yes, your Honor.

THE WITNESS: May I use my briefcase, sir?

Thank you.

Your question was our purchases of Shell for last year?

MR. BERENS: Q. Of turbine fuel for '67 for all the points at which they deliver.

A. 321,636,417 gallons.

Q. Do you have the figure for aviation gas for that same year?

A. I do. 25,099,039.

Q. Now, I think we have already established the figure for turbine fuel for East Chicago of [360] around 205 million gallons.

Do you have the figure for East Chicago on aviation gas?

A. 10,073,081.

Q. Now, is that aviation gas just of one specification?

A. It is 100-130.

Q. On what basis was Shell selected in 1953 and has continued to be your sole supplier in the East Chicago area for both turbine fuel and aviation gas?

A. Mr. Berens, in certain years we have at certain contractual times invited proposal to bid and Shell was the low successful bidder.

In other instances in the judgment of our management we elected to negotiate a contract with them and extend, and our contracts generally speaking are of the magnitude of a minimum and a maximum of four or five years.

Q. Now, the selection of Shell Oil for the East Chicago delivery—strike that.

In selecting Shell for the 43 points including the East Chicago delivery point, did you evaluate East Chicago

alone or was that evaluation [361] based on all of the points at which they were going to deliver fuel?

A. To explain, Mr. Berens, turbine fuel— when United first purchased turbine fuel and signed a contract with Shell in the fall of 1958 for fueling our aircraft when they were delivered in 1959, we invited proposal to bid of 16 oil companies, the principal 16 oil companies of the United States.

And relating to our O'Hare requirements, there must have been seven or eight oil companies bid and Shell were competitively low at that time.

Q. Now, was that bid related only to East Chicago or were the bids involving a number of the other points at which Shell eventually delivered the fuel?

A. No, it was a bid over our entire system, 105 stations.

Q. Now, you mentioned that six or seven other oil companies bid at this time for turbine fuel involving the East Chicago area.

Could you name some of these other companies?

A. Yes, sir, I could.

There was American Oil Company. We invited Sinclair [362] to bid. I don't recall whether Sinclair bid or not, but they were invited.

Mobil Oil Company were invited to bid. Phillips Petroleum were invited to bid. There were certain oil companies whose volumes of production were such that they did not have sufficient volume to supply our requirements.

Q. Which of these oil companies having refining facilities or terminal facilities in the East Chicago-Hammond-Northern Indiana area?

A. American Oil Company have a very large refinery in Whiting, Indiana.

Sinclair Refining Company are in close proximity of Shell in East Chicago, Indiana.

Mobil Oil Company are located in East Chicago, and Phillips have facilities either in—pipeline facilities either

in Hammond or East Chicago. The two towns abut, and I am not sure which town.

MR. BERENS: Your Honor, could I have the reporter read that question back. Would you read the answer?

(The answer was read.)

Q. Are these the—

[363] A. Pardon me.

May I add there were two other companies that bid. I have been sitting here thinking of them. Humble Oil and Refining bid. They have a refinery in East Chicago, and I believe we invited Texaco to bid. However, they were, if I remember correctly—they advised they did not have sufficient volume to take care of us.

Q. Does Cities Service have a refinery in the Northern Indiana area?

A. Yes, sir.

They were invited to bid. However, I don't recall whether they submited a bid or whether they declined.

Q. In what capacity does West Shore Pipeline Company act for United when Shell delivers the fuel to the meters of West Shore?

A. They are the transportation company.

Q. What is the basis for Shell's invoices for turbine fuel to United?

A. The receiving meters of West Shore Pipeline, temperature-compensating meters at Hammond, Indiana.

Q. Who is the shipper of fuel on West Shore?

A. United Air Lines.

[364] Q. Who pays for West Shore's transportation charges?

A. West Shore bill United once a month.

Q. And this once a month bill covers all three shipments, is that correct?

A. That is correct, sir. We apply an off-set on that amount of shortage fuel against the total bill.

Q. Mr. Stark, I show you United's Group Exhibit No.

32 for identification and ask you to describe what it is generally.

A. This No. 32 is the State of Indiana wholesale distributor's licensed purchased by United Air Lines for the past fifteen years and page 3 is a reproduction of our check of last July for the renewal thereof.

Q. Why do you have this Indiana license, this Indiana distributor's license, for motor fuel?

A. Because according to the laws of the State of Indiana you must have a wholesaler's license to receive large quantities of fuel.

MR. CAMPBELL: We will object to that line of questioning and the answer, your Honor, as the witness has not been qualified as an expert on the [365] Indiana laws.

THE COURT: Well, I think he is qualified to give his opinion as to that fact.

Overruled.

MR. BERENS: Q. If you know, Mr. Stark, does this license apply to your receipt of this fuel at northern Indiana at East Chicago?

THE WITNESS: A. Yes, sir.

MR. BERENS: If there is no objection, I would like to offer this Exhibit No. 32 into evidence.

THE COURT: Have you seen this exhibit?

MR. CAMPBELL: Yes. No objection.

THE COURT: It will be admitted.

(The document above-referred to, heretofore marked Plaintiff's Exhibit No. 32, for identification, was received in evidence, and is in words and figures as follows, to-wit:)

[366] MR. BERENS: Q. Who orders the turbine fuel delivered by Shell to United at Hammond?

THE WITNESS: A. The fuel ordered by United for delivery at Hammond is ordered by Lockheed Air Terminal.

Q. What is Lockheed Air Terminal Corporation?

A. Lockheed Air Terminal Corporation is a totally owned subsidiary of Lockheed Aircraft of Burbank, California.

Q. What is the business of Lockheed Air Terminal Corporation?

A. Lockheed Air Terminal Corporation was formed in 1939 for the express purpose of acting as a fueling agent for the domestic airlines of the country at various points over the country, including their own airport, Burbank.

Q. You testified, I believe, that it is a wholly-owned subsidiary of Lockheed Aircraft Corporation?

A. That's correct.

Q. If you know, does Shell Oil own Lockheed Aircraft Corporation?

A. To the best of my knowledge, they do not, sir.

Q. Does Lockheed Air Terminal Corporation act for United other than at O'Hare?

[367] A. Yes, at eleven points over our system, nine in the Continental United States, and they do our fueling at Hilo and our military fueling at Honolulu, on the military or MAC Lift.

Q. Now, you testified a moment ago that Lockheed Air Terminal arranges the orders of the fuel from Shell. Who arranges the shipments of United's fuel over West Shore Pipeline?

A. The dispatcher of West Shore Pipeline is sent a letter by Lockheed, a Lockheed employee, as an agent for United, advising the shipments for the ensuing month. The letter is sent to the dispatcher of West Shore Pipeline prior to the 10th of the preceding month.

Q. Mr. Stark, I show you United Exhibit No. 33 marked for identification and ask you to describe very generally what it constitutes.

A. This, Mr. Berens, is the agreement that I spoke of earlier, the Des Plaines storage agreement, between Lockheed Air Terminal, American Air Lines, Capital Air Lines

and United Air Lines, entered into in December of 1959 for the operation and maintenance of the Des Plaines Storage terminal.

MR. BERENS: Unless there is any objection, we [368] will offer this now into evidence.

MR. CAMPBELL: No objection.

THE COURT: It is admitted.

(The document above-referred to, heretofore marked as Plaintiff's Exhibit No. 33, for identification, was received in evidence, and is in words and figures as follows, to-wit:)

[369] MR. BERENS: Q. How often is United billed by Shell for the turbine fuel purchased in East Chicago for delivery—strike that.

How often is United billed by Shell for the turbine fuel delivered in East Chicago to the West Shore Pipeline Company?

THE WITNESS: A. Three times each month.

Q. Are these bills sent directly to United?

A. Yes, they are.

The billings come out of Indianapolis office of Shell and are mailed directly to us.

Q. How often does United pay these invoices?

A. Within a very few days.

These are discounted bills, and all Shell bills received from other parts of the country, together with these, are paid promptly.

Q. Where is this payment made and how is it made?

THE COURT: Isn't it made to the Indianapolis office?

THE WITNESS: A. It is made by check to the Shell office at 450 Meridian Street, Indianapolis, Indiana.

MR. BERENS: Q. Is Lockheed involved in any way in the payments made to either Shell or West Shore?

[370] A. No, sir, they are not.

* * *

[401] Q. If you know, Mr. Stark, does Shell Oil Company have any ownership interest in Butler Aviation?

A. To the best of my knowledge, they do not.

Q. Now, under the Butler agreement, does United as principal have the authority to direct Butler's activities under the contract?

A. Yes, we do.

They are under our direct supervision. Our station manager at Midway directs Butler in the method, form and mode of service.

Q. Referring back to the Lockheed agreement, both of the Lockheed agreements, both for Des Plaines, the break-out storage and on-the-field at O'Hare, do the principals of those agreements, in particular United, have the right under the agreements to direct the activities of Lockheed?

A. We have the right and we do direct them.

I am in telephone contact with Lockheed several times a day on matters of their agency.

• • •

[407] You testified several days ago in regard to the Indiana gross income tax, that you pay the [408] amount to Shell Oil.

When you made that statement, were you referring to the physical remitting of the funds to Shell Oil?

A. I was.

• • •

[430] You may proceed.

CHARLES WELDON SUMMERS,

was thereupon called as a witness herein, after having been first duly sworn, and was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BERENS:

Q. Would you state your name, please?

A. Charles Weldon Summers.

Q. Your address?

A. 849 Willow Lane, Hinsdale, Illinois.

THE COURT: What lane?

THE WITNESS: Willow.

MR. BERENS: Q. For whom do you work?

THE WITNESS: A. Shell Oil Company.

Q. What is your present title?

A. My title is manager tax, the Chicago Tax Office.

Q. Would you describe in general your duties?

A. I am responsible for the tax administration of state and local taxes in about a nine-state area covered by the Chicago Tax Office.

This includes property, sales and use and various other state and local taxes, motor fuel.

[431] Q. As part of your duties, are you involved with or familiar with the Illinois Department of Revenue audits of Shell Oil under the R.O.T. and Use Tax Acts?

A. I am.

Q. For what period has Shell Oil been audited under these acts?

A. Our last audit ended as of December 31, 1965.

Q. Incident of this audit, did the auditors set up any R.O.T. liability for Shell on the basis that they had delivered any type of fuel product to customers in Illinois?

MR. CAMPBELL: Object to the line of questioning, your Honor.

An audit by the auditors of the Department of Revenue could relate to a number of factors. There is a number of revenue acts in the State of Illinois.

MR. BERENS: I said R.O.T.

MR. CAMPBELL: Whether there was an audit or not by the auditors of the Department of Revenue, it would have no bearing on this lawsuit.

• • •

[436] MR. BERENS: Would you please read the question again?

(The question was read as follows: "Incident of this audit, did the auditors set up any R.O.T. liability for Shell on the basis that they had delivered any type of fuel product to customers in Illinois?")

THE WITNESS: A. There was an assessment for R.O.T.

Q. During this audit, did the auditors set up any liability for Shell on the basis that they [437] should have collected use tax from customers because of the delivery of any type of fuel in Illinois?

A. There was an assessment for use tax on Shell.

Q. And both of these assessments—strike that.

The assessments that we are referring to of R.O.T. or use tax were based on the issue of that delivery had been in Illinois rather than in some other state as originally returned by Shell?

MR. BROMBERG: I object, your Honor.

THE COURT: That is quite a little bit leading, I will say that.

The objection is sustained.

MR. BERENS: All right.

Q. During this audit, did the auditors set up any R.O.T. or use tax liability on the basis that fuel, turbine fuel or aviation gas, purported to be delivered by Shell to United in Indiana actually was delivered in Illinois?

THE WITNESS: A. No, not to my knowledge, they did not.

* * *

[Caption Omitted]

## OPINION OF TRIAL COURT

This suit was commenced by United Air Lines, Inc. to enjoin the assessment and collection of Illinois Use Tax measured by the amount of fuel owned by United and loaded in Illinois into fuel tanks of its aircrafts to propel them in interstate and foreign commerce.

In arriving at a decision in this case, which as far as I have been able to determine is without precedent in this State, or for that matter in any of the other States, I have been greatly aided by the excellent memorandum of authorities submitted by the attorneys for each of the parties.

The plaintiff contends and the proof establishes that all of this fuel is purchased from Shell Oil Company in the State of Indiana, and is transferred to storage facilities at or near O'Hare and Midway Airports for temporary stor-

age and then loaded into the fuel tanks of the aircraft for use beyond the borders of the State of Illinois. With respect to the fuel designated for use in the planes operating out of O'Hare Field the fuel is transported by pipeline from either Hammond or East Chicago, Indiana, to a storage tank located in DesPlaines, Illinois, which is owned by Shell and leased jointly to United and American Airlines Company. From there it is then transferred by a series of pipelines to O'Hare Field and eventually pumped or placed in plaintiff's aircraft. With respect to Midway, the fuel is transferred by truck and placed in storage and ultimately placed in the planes.

Since the adoption of the Use Tax Act in 1955, until June, 1963, all common carriers were required to pay a tax only on that portion of the fuel actually consumed in the State of Illinois, which concept of liability under that Act has been designated in the trial of this matter as the "Burnoff theory."

On June 3, 1963, the then Director of Revenue, Theodore J. Isaacs, ruled the Department's position to be that "temporary storage ends and taxable use occurs when the fuel is taken out of storage facilities and placed in the tank of the airplane, railroad engine or truck. At this point the fuel is converted into its ultimate use, and therefore a taxable use occurs in Illinois." The announced purpose of the bulletin as stated therein was to "clarify the Department's position concerning the temporary storage provisions of the Use Tax Act and their relationship to fuel consumed by a common carrier."

It is this interpretation of the Use Tax Act which is attacked by the plaintiff.

Plaintiff contends that this interpretation is unauthorized by, and contrary to the Use Tax Act, and is violative of Article 2, Section 2; Article 4, Section 13; and Article 9, Section 1, of the Constitution of the State of Illinois; as well as Article 1, Section 8, Clause 3; Article 1, Section 10, Clause 2, of the Constitution of the United States, and the Fourteenth Amendment thereto.

As I understand the position of the plaintiff, it contends that none of the fuel placed in the tanks of its planes in Illinois is consumed in Illinois. To support this, plaintiff submits that a regulation of the Civil Aeronautic Board requires that all planes arriving at Midway or O'Hare must carry reserve fuel sufficient to carry them to other airports such as Milwaukee, Detroit, Indianapolis, St. Louis, etc. in case they are not able to land at the local airports. By virtue of flying at an altitude in excess of 30,000 feet this fuel becomes extremely cold and when refueling takes place at local airports, the fuel is much warmer and consequently when injected into the plane rises to the top of the fuel tank. This results, plaintiff contends, in the cold fuel which was in the plane on its arrival, being used first, and which fuel, in all or practically all instances, is more than sufficient to propel the planes out of Illinois.

Plaintiff's evidence that higher temperature of fuel pumped into tanks of its planes upon their arrival in Illinois causes such fuel to flow through and rise above any colder fuel in those tanks corroborates the fact that such natural phenomenon results.

This evidence, however, does not permit this Court to then conclude that therefore none of the fuel pumped in Illinois into those tanks was consumed in propelling plaintiff's planes through the State of Illinois.

Plaintiff then contends that in any event, the Use Tax Act required it to pay that tax only on the amount of fuel consumed in Illinois. The law, however, is otherwise. The Supreme Court of this State has consistently stated that the tax is imposed on the *privilege* of use, not *on the extent of the use* of the privilege. It matters not how much of the fuel is consumed in Illinois. (Bode vs. Barrett, 412 Ill. 204; Turner vs. Wright, 11 Ill. 2d. 161; Hicklin vs. Coney, 290 U.S. 169.)

Further it appears from the statute and the law that the definition of "use" extends beyond actual "consumption" of tangible personal property. The statute defines use as fol-

lows: "Use means the exercise by any person of any right or power over tangle personal property incident to the ownership of that property." (Ch. 120, Par. 439.2, Ill. Rev. Stat.)

Unquestioned here is the fact that plaintiff owns the fuel that it causes to be stored in the storage tanks in Illinois, from which tanks it further causes such fuel to be withdrawn, then conveyed to the planes, and then pumped into the fuel tanks of those planes in Illinois.

Those facts clearly disclose that plaintiff does "exercise a right or power over tangible personal property (the fuel) incident to the ownership of that property" in Illinois. This is the exact statutory definition of "use." The tax is properly imposed on the privilege of exercising such dominion. (Turner vs. Wright, 11 Ill. 2d. 161; Miller Brewing Co. vs. Korshak, 35 Ill. 2d 86; Philco Corporation, et al., vs. Department of Revenue, Doc. Nos. 40497, 40582, rehearing denied September 1968, not yet officially reported.)

It seems apparent that the facts in this case invoke tax consequence unless plaintiff is excluded by one of the exemptions in the Act. If plaintiff is excluded, it must be by virtue of Subparagraph (d) of Paragraph 439.33, which is as follows:

> (d) the temporary storage, in this State, of property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, is used solely outside this State or physically attached to or incorporated into other property that is used solely outside this State.

At first impression it appears that this provision might indeed exempt plaintiff from tax consequence on fuel which it proves is consumed solely outside the State of Illinois, even though plaintiff in Illinois exercises dominion over that fuel which constitutes the "use" under the Act invoking tax liability.

However, two reasons emerge why plaintiff is not entitled to this exemption.

First, plaintiff has not met the burden of proof the law requires. As stated previously, I cannot conclude from the

evidence that *none* of the fuel placed in the tanks of its planes in Illinois was consumed here. In addition, many of the plaintiff's flights originate in Chicago, and the conclusion must be drawn that most, if not all, of these flights take on the bulk of their fuel here.

Second, in my opinion, the exemption intended to be granted by the Legislature is not available to the plaintiff.

As I read that exemption in the context of the purpose of the Act, and the applicable law, the exemption is restricted to that class of tangible personal property which enters the State of Illinois, temporarily rests here, then leaves to be sold or resold outside the State. The property *itself* must be capable of interstate mercantile transaction after it leaves Illinois. Plaintiff's fuel does not meet this test. Plaintiff itself consumes that fuel.

It is my opinion that the interpretation placed on the Act by the then Director of Revenue is authorized by, and in accord with that Act. Both the Act and the interpretation are proper and valid, and do not violate any of the State or Federal Constitutional provisions as claimed by the plaintiff. I so hold.

• • •

[Caption Omitted]

**FINAL DECREE**

This cause having come on for trial, evidence having been adduced by the parties, briefs having been filed, and the opinion of the Court having been given,

IT IS ORDERED:

(a) Judgment is hereby entered in favor of the defendants, Theodore A. Jones, Director of Revenue of the Department of Revenue of the State of Illinois, and Adlai E. Stevenson, Treasurer of the State of Illinois, in accordance with the written opinion of Judge Thomas C. Donovan delivered on December 9, 1968, which opinion is hereby ordered to be filed as a part of the record in this cause and is hereby incorporated by reference into this Final Decree.

(b) If no appeal has been perfected within the time permitted by law, all orders granting temporary injuctions in this cause shall, as of that time and in that event, be vacated and dissolved, and the Treasurer of the State of Illinois is, as of that time and in that event, directed to transfer all sums now or then held in the protest fund maintained by the Treasurer for the purpose of, and pertaining to the fuel involved in, this litigation into the General Revenue Fund of the State of Illinois.

(c) If, however, an appeal is perfected within the time permitted by law (i.e., either within thirty (30) days of the date of this Final Decree or within thirty (30) days of this Court's determination of any motion made pursuant to 1967 *Ill. Rev. Stat.*, Ch. 110, § 68.3), said temporary injunctions shall remain in full force and effect, and the Treasurer of the State of Illinois shall keep the amounts heretofore and hereafter paid under protest in such protest fund pending further order of this Court.

(d) In the event an appeal is perfected as provided in paragraph (c) hereof, United Air Lines, Inc., shall continue to pay the amount of its potential use tax liability for the fuel involved in this lawsuit into such protest fund in the same manner as it has heretofore done.

Dated: December 23rd, 1968

Enter:

/s/ THOMAS C. DONOVAN
Judge Thomas C. Donovan

Judge Donovan
Dec. 23, 1968
Circuit Court

* * *

[Caption Omitted]

## NOTICE OF APPEAL TO THE SUPREME COURT

1. United Air Lines, Inc., plaintiff-appellant, hereby appeals to the Illinois Supreme Court from the Final Decree entered on December 23, 1968.

2. Plaintiff-appellant prays that said Final Decree be reversed and that this cause be remanded to the Circuit Court of Cook County with instructions to enter an appropriate final decree in favor of plaintiff-appellant or for further proceedings as the Illinois Supreme Court shall determine.

UNITED AIR LINES, INC.

By MARK H. BERENS
Mark H. Berens

/s/ WM. BRUCE HOFF, JR.
Wm. Bruce Hoff, Jr.

231 South LaSalle Street
Chicago, Illinois 60604
STate 2-0600

Its Attorneys

*Of Counsel:*
MAYER, FRIEDLICH, SPIESS,
TIERNEY, BROWN & PLATT

[475] [Caption Omitted]

**ORDER**

This cause coming on to be heard on the motion of United Air Lines, Inc., plaintiff, and due notice of said motion having been given,

IT IS ORDERED:

A. That the Report of Proceedings heretofore filed herein should be and the same is hereby certified as true and correct.

B. That the following persons should be and the same are hereby substituted as party defendants herein:

1. George E. Mahin, as Director of Revenue of the Department of Revenue of the State of Illinois;
2. William J. Scott, as Attorney General of the State of Illinois;

[476] 3. Adlai E. Stevenson, III, as Treasurer of the State of Illinois.

C. That plaintiff is hereby authorized to file, instanter, copies of the following documents for inclusion in the full Record on Appeal:

1. Order of Temporary Injunction, entered September 19, 1963;
2. Amended Complaint in Chancery, with exhibits, filed September 25, 1963;
3. United Exhibits 1, 2 and 3, admitted into evidence at the trial herein;
4. Excerpts from United Exhibit 22 as designated in plaintiff's Praecipe for Trial Court Record; and
5. Objection to Request for Admission, filed February 16, 1968.

Dated: April 15, 1969.

Enter:

/s/ THOMAS C. DONOVAN

Judge

[5] [In the Supreme Court of Illinois]
Docket No. 42042—Agenda 37—May, 1970.
UNITED AIR LINES, INC., Appellant. *vs.* GEORGE E. MAHIN *et al.*, Appellees.

PER CURIAM: United Air Lines, Inc., brought this action in the circuit court of Cook County to enjoin the Department of Revenue from assessing and collecting Illinois use tax on aviation fuel loaded at Chicago airports on planes of United which are about to embark upon, or to continue upon, interstate and foreign flights. Named as defendants were appropriate State officials and United's supplier, the latter having the burden of collecting the tax. Judgment was for defendants and United has appealed, being joined by American Airlines, Braniff Airways and Northwest Airlines, to whom we have granted leave to file briefs as *amici curiae*.

The Use Tax Act, which went into effect in August, 1955, (Laws of 1955, p. 2027), imposes a tax on the privilege of using in this State tangible personal property that was purchased elsewhere, and was designed to complement the Retailers' Occupation Tax Act, (Laws of 1933, p. 924), under which a tax is imposed upon persons engaged in the business of selling tangible personal property to purchasers for use and consumption. It has been found to be constitutional (*Turner* v. *Wright*, 11 Ill.2d 161), and it is settled that the Use Tax Act was enacted for the valid purposes of preventing evasion of retailers' occupation tax by persons making out-of-state purchases of tangible personal property for use in Illinois, and of protecting Illinois merchants against diversion of business. At issue here, a matter of first impression, is the construction and application of that portion of section 3 of the Act which, from its inception in 1955, has provided for an exemption from the tax in these terms: "To prevent actual or likely multistate taxation, the tax herein imposed shall not apply to the use of

tangible personal property in this State under the following circumstances: * * * (d) the temporary storage, in this State, of tangible personal property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, is used solely outside this State * * * ." Ill. Rev. Stat. 1955, ch. 120, par. 439.3.

Conforming to a practice which has been essentially the same since May, 1953, United purchases and takes delivery of the aviation fuel in question from Shell Oil Company at facilities of the latter located in Hammond and East Chicago, Indiana. Thereafter, United transports it by common carrier pipeline and trucks to its underground storage facilities at O'Hare and Midway airports in Illinois. Fuel transported by pipeline is first placed in storage tanks at Des Plaines, Illinois, and from there, as needed, is piped to the underground facilities. It remains in the latter only so long as necessary for certain purification processes, and from there is pumped into the tanks of United's aircraft, almost always immediately prior to departure time. United pays the tax on fuel used in intrastate flights, training flights and the like, and the dispute here relates only to fuel loaded on planes departing on interstate or foreign flights, United having 234 such flights each day. All of the aircraft involved must fly over specific routes prescribed by Federal aviation authorities, and thus the amounts of fuel consumed from the time the engines of the planes are started at the Illinois airports until they pass over Illinois borders can be determined with great accuracy.

From the record it appears that there were, and are, numerous common carriers, such as railroads, airlines and trucklines, which, like United, engaged in the practice of purchasing their fuel outside Illinois and storing it here prior to their use of it to propel equipment setting forth on interstate journeys. Immediately after the enactment of the

Use Tax Act in 1955, the Department of Revenue uniformly and consistently interpreted and applied the Act to these carriers in such a manner that the incidence and measure of the tax was taken to be only that portion of the fuel consumed in or over Illinois. This construction has been commonly referred to as the "burn off" rule and, during the period of its application, provoked no amendatory legislation. Eight years later, on June 3, 1963, the Department abruptly changed its interpretation and issued a bulletin which announced:

"The Department's position is that temporary storage ends and a taxable use occurs when the fuel is taken out of storage and placed into the tanks of the airplane, railroad engine or truck. At this point the fuel is converted into its ultimate use, and, therefore, a taxable use occurs in Illinois.

"If a common carrier does not have separate facilities for transferring the fuel out of the State of Illinois but always puts it into the tank of the airplane, railroad engine or truck for final consumption, then they no longer will be able to give a certificate to the vendor stating that the fuel is purchased within the temporary storage provisions of the Use Tax Act, but must pay the Use Tax to their supplier." In short, under this construction all fuel loaded on United's planes at the two airports was deemed to measure the tax, and the exemption in question was construed as having application only if the temporarily stored fuel is transported out of the state for use elsewhere by some means other than placing it in equipment which would consume it.

The present action, which for reasons not apparent in the record has been slow to progress, was soon initiated by United to enjoin the collection of the tax. In substance, it was the position of United that the new construction was erroneous and unreasonable, that the application of the Act as proposed contravenes the Illinois and Federal constitutions, and that it has no use tax liability incident to the fuel

in controversy, or, alternatively, that it is liable only for tax measured by the amount of fuel burned in and over Illinois. The trial court rejected these contentions and United has renewed them here.

To support its contention that the "burn off" construction indulged in by the Department for 8 years should continue to prevail, United relies principally upon the rule of statutory construction that courts, in determining the proper construction of an ambiguous statute, will consider and give weight to the contemporaneous construction placed upon a statute by the governmental officers or departments charged with the duty of administering it, and will usually adopt such contemporaneous construction where it is a reasonably permissible construction, has the implied assent of the legislature, and has been consistent, uniform and long continued. (See: *People ex rel. Spiegel* v. *Lyons*, 1 Ill.2d 409; *Illinois Bell Telephone Co.* v. *Illinois Commerce Com.*, 414 Ill. 275; *United States* v. *Leslie Salt Co.*, 350 U.S. 383. 100 L. Ed. 441, 76 S. Ct. 416; *Cory Corp.* v. *Sauber*, 363 U.S. 709, 4 L. Ed. 2d 1508, 80 S. Ct. 1331.) For reasons later to appear, we do not believe the statute is ambiguous; but even if ambiguity be assumed, the rule of construction relied upon cannot be employed in this case. As the rule itself recognizes, executive or administrative construction is not binding on the courts if it is erroneous (*P. H. Mallen Co.* v. *Department of Finance*, 372 Ill. 598; *Superior Coal Co.* v. *Department of Revenue*, 4 Ill. 2d 459), and in our opinion the "burn off" construction is constitutionally impermissible.

That construction of the statute, to repeat, measured the tax by the amounts of fuel consumed by United's planes in and over Illinois as they proceeded on their interstate journeys. And while it is difficult to see how such a construction could be derived from statutory language which grants exemption to temporarily stored property that is used "solely outside of this State," it is sufficient to say that the con-

struction runs afoul of the commerce clause of the United States constitution. Decisive and binding authority for this conclusion is found in *Helson* v. *Kentucky* (1929), 279 U.S. 245, 73 L. Ed. 683, 49 S. Ct. 279, determined under facts which, in effect at least, cannot be distinguished from those of the present case. Involved there was an Ohio river ferry operated exclusively in interstate commerce between Kentucky and Illinois. Gasoline used to power the ferry was purchased and delivered in Illinois, situs of the residence and business of the operator, and it was stipulated that "75 per cent of this gasoline was actually consumed within the limits of Kentucky, *but all of it in the making of interstate journeys.*" (279 U.S. at 248; emphasis added.) Issue arose when Kentucky sought to impose a tax on the gasoline consumed within its limits under a statute which, *inter alia*, authorized a tax on gasoline purchased "without the state" but used "within the state." Overruling Kentucky courts, the Supreme Court found under the circumstances that the gasoline was an instumentality of interstate commerce, thus causing the tax to be "exacted as the price of the privilege of using an instrumentality of interstate commerce," (279 U.S. at 252,) and struck it down as being an invasion of the exclusive power of Congress to regulate such commerce.

Our own statute must be held subject to the same infirmity when the amount of fuel consumed, or "burned off," within the limits of Illinois is made the incidence and measure of the use tax. All of the fuel over which controversy has arisen is consumed in the making of interstate journeys, and once the engines of a plane are started in Illinois, it can be said unequivocally that the fuel becomes an instrumentality of interstate commerce. Under the compulsion of *Helson*, to impose a tax based upon consumption within Illinois is to exact a tax on the privilege of using the fuel in interstate commerce. (*Cf. Shell Oil Co.* v. *State*

*Board of Equalization*, 64 Cal.2d 713, 414 P.2d 820, 827; *Texas Gas Transmission Corp.* v. *Benson*, 444 S.W.2d 137; *W. R. Grace & Co.* v. *Comptroller of the Treasury*, 255 Md. 550, 258 A. 2d 740.) And there is more here than was involved in *Helson*. United's planes pass over many States. They do not refuel in each State, but fuel loaded here is necessarily used or consumed over and within each State. Should every State wherein fuel is consumed seek to impose a use tax measured by the amounts of fuel consumed within its borders, an intolerable burden on interstate commerce would result. *Cf. United Air Lines, Inc.* v. *Illinois Commerce Co.*, 32 Ill.2d 516.

Seeking to avoid the impact of *Helson*, United argues that the placing and presence of the fuel in departing planes is but a continuation of temporary storage; that the burning of fuel in and over Illinois is simultaneously consumption and the termination of temporary storage, and that the release from storage as the plane is operated in Illinois is a local event, or use, properly taxable by Illinois. Or, to put it another way, United asserts that all fuel placed in the tanks of its planes continues to be exempt under the temporary storage provision of our Act, and that the exemption is lost, and the fuel subject to the tax, only to the extent of the fuel released from the tanks for consumption in and over Illinois.

While we entertain grave doubts that *Helson* could be evaded by the fine distinction between "consumption" and "simultaneous consumption and termination from storage," and believe it probable that the fuel becomes an instrumentality of interstate commerce when it is loaded on a plane, the basic premise of the construction advanced is a faulty one. The placing and presence of the fuel in the tanks of aircraft may be "storage" in a special or technical sense, but we think it clear that the legislature did not intend for the temporary storage exemption to extend to "storage"

of such nature. It is axiomatic that the words used in a statute should generally be given their plain and ordinary, or commonly accepted meaning, unless to do so would defeat the manifest intent of the legislature. (See: 34 I.L.P., Statutes, § 117.) Here the statutory references are to "the temporary storage, in this State," of tangible personal property, and to such property "stored here temporarily." The noun "storage" is specifically defined as meaning "the act of depositing in a store or warehouse for safekeeping" and, consistent therewith, the verb "store" is defined as meaning "to deposit in a store or warehouse for safekeeping." (See: Webster's New Twentieth Century Dictionary, 2d ed., pp. 1795 and 1796; *Bandosz* v. *A. Daigger and Co.*, 255 Ill. App. 494, 499.) It may be observed, too, that such meanings are consistent with the legislative purpose of exempting only temporarily stored property used solely outside Illinois. Fuel is not placed or present in the tanks of an airplane for the purpose of safekeeping, and there is no rule of construction which permits a court to say that the legislature did not mean what the plain language of a statute imports. (*Western National Bank of Cicero* v. *Village of Kildeer*, 19 Ill.2d 342.) Appropriate here in light of United's effort to attribute a special or technical meaning to the language of the Act, is the observation in *People* v. *Day*, 321 Ill. 552, 555, which states: "What the framers of a statute would have done had it been in their minds that a case like the one here under consideration would arise is not the point to be considered. The inquiry is what, in fact, they did enact, probably without anticipating the existence of such facts." We conclude that the "burn off" construction was improper and that it cannot prevail as United insists.

Next to be determined is the proper construction of the temporary storage provision of the Act and, in relation thereto, the positions and arguments of the parties focus

upon *Edelman* v. *Boeing Air Transport, Inc.* (1933), 289 U.S. 249, 77 L. Ed. 1155, 53 S. Ct. 591. In that case the State of Wyoming imposed a tax on all gasoline used or sold in the State. Boeing, which operated out of two airports within the State, maintained an air service for transporting passengers, mail and express in interstate commerce. It purchased gasoline both within and without the State which was intermingled and stored in tanks at the airports from whence it was either sold or put into Boeing's own planes. Tax liability was admitted for the portions of the gasoline sold or used in intrastate flights, but, in apparent reliance on *Helson*, it was contended that the tax could not be validly applied to so much of the gasoline imported from outside the State as was loaded from the storage tanks into planes that consumed it in interstate flights. Rejecting this contention, the court said: "As the statute has been administratively construed and applied, the tax is not levied upon the consumption of gasoline in furnishing motive power for respondent's interstate planes. The tax is applied to the stored gasoline as it is withdrawn from the storage tanks at the airport and placed in the planes. No tax is collected for gasoline consumed in respondent's planes either on coming into the State or on going out. It is at the time of withdrawal alone that 'use' is measured for the purposes of the tax. The stored gasoline is deemed to be 'used' within the State and therefore subject to the tax, when it is withdrawn from the tanks. • • • A State may validly tax the 'use' to which gasoline is put in withdrawing it from storage within the State, and placing it in the tanks of the planes, notwithstanding that its ultimate function is to generate motive power for carrying on interstate commerce. Such a tax cannot be distinguished from that considered and upheld in *Nashville, Chattanooga & St. Louis Ry.* v. *Wallace, supra.* [288 U.S. 249.] There it was pointed out that 'there can be no valid

objection to the taxation of the exercise of any right or power incident to * * * ownership of the gasoline which falls short of a tax directly imposed on its use in interstate commerce, deemed forbidden in *Helson* v. *Kentucky*, 279 U.S. 245. As the exercise of the powers taxed, the storage and withdrawal from storage of the gasoline, was complete before interstate commerce began, it was held that the burden of the tax was too indirect and remote from the function of interstate commerce, to transgress constitutional limitations." 289 U.S. at 251, 252.

Our own statute defines a taxable "use" as being "the exercise by any person of any right or power over tangible personal property incident to the ownership of such property" (Ill. Rev. Stats. 1961 and 1969, ch. 120, par. 439.2), and it is the contention of defendants that a taxable use occurs when United withdraws its fuel from storage and places it in its planes. United agrees that either storage (*Wallace*, 288 U.S. 249), or withdrawal from storage (*Edelman*), are the exercise of rights which might have been constitutionally taxed under our Act. It insists, however, that our legislature waived the right to tax either event when it enacted the temporary storage provision, and from this position argues that if the loading on the aircraft is intended as the taxable event, then the tax is constitutionally improper as being imposed upon an integral activity of interstate commerce. (*Cf. Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 98 L. Ed. 583, 74 S. Ct. 396; *Puget Sound Stevedoring Co.* v. *Tax Com.*, 302 U.S. 90, 82 L. Ed. 68; *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 91 L. Ed. 993; *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69, 91 L. Ed. 80.) But both parties, in our view, oversimplify the problem by failing to consider the specific language of the Act, which we are bound to construe so that all of its provisions are given effective meaning. *People ex rel. Barrett* v. *Barrett*, 31 Ill.2d 360; *Pliakos* v. *Liquor Control Com.*, 11 Ill.2d 456.

In language which we find to be plain, simple and unambiguous, the Act has granted exemption to "the temporary storage, in this State, of tangible personal property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, *is used solely outside this State.*" (Emphasis added.) Exemption is thus granted only as to tangible personal property which is stored here temporarily and which, upon withdrawal from storage, is to be used solely outside Illinois. To put it another way, the legislature has stated that the temporary storage and the withdrawal therefrom are not taxable uses, if the property in question is to be used solely outside the State. It is clear that if United was to withdraw its fuel from storage at Des Plaines and the airports and transport it outside the State for use elsewhere, as for example at an airport in nearby Wisconsin, the exemption would apply and neither the storage, nor the withdrawal, nor the transportation of the fuel outside the State would be uses subject to the tax. But United does not store in Illinois with any intention that the fuel will be used solely outside this State. Rather, the fuel is stored here only to facilitate United's operations from the O'Hare and Midway airports within the State. Under the circumstances, the "storage" becomes something more than a "temporary storage" for safekeeping subsequent to its use solely outside of Illinois. Such storage, under the plain words of the statute, does not qualify under the temporary storage exemption and, as the authorities already discussed reveal, either the storage itself or the withdrawal therefrom are uses which may be taxed without offending the commerce clause of the Federal constitution.

Contention is next made that the Department, in applying the tax, has done so in such a manner as to violate the provision of section 1 of article IX of the Illinois constitution which requires taxation to be "uniform as to the class

upon which it operates." However, there is no proof in this record that there has been a lack of uniformity or discrimination within the class of taxpayers affected, and as a consequence there is nothing which permits us to determine the issue sought to be raised. It may be added, too, that this contention is erroneously premised on a theory that the fuel stored by United is eligible for the protection of the temporary storage exemption, and that the tax has been laid on either the withdrawal of the fuel from storage or its transportation outside the State. In either event, the constitutional claim made must be found to be without merit.

For the reasons stated, the judgment of the circuit court of Cook County is affirmed.

*Judgment affirmed.*

MR. CHIEF JUSTICE UNDERWOOD specially concurring:

I agree that Illinois may constitutionally collect the tax imposed in this case on all of the fuel loaded on United's planes at the airports. I am, however, not at all certain that application of the "burn off" rule would, as the opinion indicates, be constitutionally impermissible if the statute so provides. In my opinion the statute does not so provide, but rather clearly exempts the fuel in question here only when "used solely outside this State". I do not consider discussion of the "burn off" rule necessary to the decision, and would affirm on what I consider to be the plain meaning of the statutory language.

MR. JUSTICE GOLDENHERSH joins in this concurrence.

MR. JUSTICE KLUCZYNSKI, dissenting:

I disagree with the majority's conclusion that the interpretation of section 3 of the Use Tax Act (Ill. Rev. Stat. 1955, ch. 120 par. 439.3) as originally given by the Department of Revenue was erroneous and that such an interpretation would be violative of the commerce clause.

The events of storing fuel in Illinois or the taking of

fuel from storage in Illinois are constitutionally taxable under our Act because the events are complete before interstate commerce begins. (*Nashville, Chattanooga & St. Louis Railway* v. *Wallace*, 288 U.S. 249, 77 L. Ed. 730, 53 S. Ct. 345; *Edelman* v. *Boeing Air Transport, Inc.*, 289 U.S. 249, 77 L. Ed. 1155, 53 S. Ct. 591.) Thus a tax measured by the value of the entire tank of fuel is constitutionally permissible and it follows that a tax measured by something less would also be permissible.

Section 3 of the Act in part provides: "To prevent actual or likely multistate taxation, the tax herein imposed shall not apply to the use of tangible personal property in this State under the following circumstances: * * * (d) the temporary storage, in this State, of tangible personal property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, is used solely outside this State * * * ." (Ill. Rev. Stat. 1955, ch. 120, par. 439.3.) I believe that this section exempts that portion of the fuel which "stored here temporarily, is used solely outside this State." The intent of the owner when the fuel is placed in the tanks of the airplane is that a certain portion will be consumed in the State of Illinois. This portion is no longer exempt under section 3 and therefore taxable. The remainder of the fuel is stored in the tanks for use solely outside the State of Illinois and keeps its exempt status while in the tanks.

Such an interpretation was given to the exemption from its enactment in 1955 until June 3, 1963, when the Department of Revenue changed its position so that a tax, measured by the value of the entire tank of fuel, is imposed when fuel is taken out of a storage tank and placed into tanks of the airplane. I believe, however, that the original construction given to the statute is correct for the following reasons: First, it is a reasonable construction of the wording of the

exemption which admittedly is capable of other reasonable interpretations when applied to the facts of this case.

Secondly, the construction given to the statute at the time of enactment by the agency administering the statute is entitled to substantial weight. Before the Governor signed the Use Tax Act in July, 1955, the Department of Revenue, in response to an inquiry by the Honorable Paul Randolph (member of Illinois House of Representatives, Chairman of the Revenue Committee of the House and member of the joint House-Senate Conference Committee which recommended the Use Tax Bill for passage) stated in a letter to him its intent as to how it would administer the Act. The letter was written on July 12, 1955, by Willard Ice, then Supervisor, Rules and Regulations Division of the Department of Revenue, and stated that if a carrier purchased fuel outside of the State "and some of the items or units thereof (such as so many gallons of gasoline) are used in Illinois and some of the items or units thereof (such as so many gallons of gasoline) are used outside of Illinois, the carrier would be liable for the use tax on the items used in Illinois, but not on the items used outside of Illinois assuming that the carrier keeps adequate records to segregate the nontaxable from the taxable items."

Thirdly, the exemption as originally construed, had been applied continuously and uniformly for an extended period of time. And finally, during the eight years when the Department's original construction was in effect, the Illinois legislature amended section 3 of the Use Tax Act, at least once each session without repudiating the Department's construction. Thus, the legislature gave implied consent to the construction by nonaction on its part. See: *Canada Packers, Ltd.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 385 U.S. 182, 17 L. Ed. 2d 281, 87 S. Ct. 359; *Cory Corp.* v. *Sauber*, 363 U.S. 709, 4 L. Ed. 1508, 8 S. Ct. 1331; *United States* v. *Leslie Salt Co.*, 350 U.S. 383, 100 L. Ed. 441, 76 S. Ct. 416;

*People ex rel. Spiegel* v. *Lyons*, 1 Ill. 2d 409; *Illinois Bell Telephone Co.* v. *Commerce Com.*, 414 Ill. 275.

For these reasons I would reverse the judgment of the circuit court of Cook County.

SCHAEFER and DAVIS, JJ., join in this dissent.

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[Caption Omitted]

## PETITION FOR REHEARING BY UNITED AIR LINES, INC. STATEMENT OF GROUNDS URGED

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United Air Lines, Inc. ("United") respectfully requests this Court to grant it rehearing in this case for the reasons stated herein.

1. The Court's interpretation of the temporary storage provision, which in effect makes fuel stored in Illinois by a common carrier taxable because it is stored for consumption in the carrier's interstate operations from Illinois, both imposes an unconstitutional burden on interstate commerce and contravenes the purpose and language of the statute.

2. The *per curiam* opinion* incorrectly concludes that *Helson & Randolph* v. *Kentucky*, 279 U.S. 245 (1929), prohibits the use of the "burn-off rule" to tax only that portion of Illinois-laden fuel actually burned in Illinois. This interpretation leads to the anomalous conclusion that taxing only that *part* of Illinois-loaded fuel *actually burned* in Illinois is a greater burden on interstate commerce than taxing *all* of the fuel *loaded* in Illinois.

3. As applied to fuel used by interstate carriers, the temporary storage provision is not "plain, simple and unambiguous," nor does the burn-off rule violate the Commerce Clause. Accordingly, the burn-off rule, which is a

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* Hereinafter sometimes referred to as the Court's opinion.

reasonably permissible construction of the statute, should be followed under the doctrine of contemporaneous administrative construction. In fact, the legislative history of the temporary storage provision so clearly shows the legislative intent that an invalidation of that rule would frustrate such intent.

• • •

In addition to these substantive grounds, United submits that other important considerations arising from the unusual history and present posture of the case make rehearing—and reargument—appropriate and advisable.

Three of the Justices who participated in the decision were not members of the Court at the time the case was argued orally. United realizes that this is also true of other cases on the Court's docket, and appreciates that, for administrative and other substantial reasons, the Court cannot order reargument of all such cases. In this case, however, the Court is widely split among three viewpoints, the basic issue is one of first impression, major amounts of tax are involved, and the Court's opinion has viewed as decisive aspects of the case that were not comprehensively briefed or argued by the parties more than eleven months ago.

For these reasons, United believes that reargument of the case would be beneficial to the entire Court, and in particular for those Justices who were not sitting at the time of the original argument.

## FACTUAL RESUME

It may be helpful to restate certain salient and *uncontroverted facts* in the record regarding the aviation fuel which the Court's decision would subject to Illinois use tax (see generally United's main Brief,* pp. 15-23, 42-45):

* Hereinafter referred to as United's Brief or "U.Br.".

1. All the fuel is purchased in Indiana by United, subject to the Indiana gross income tax, currently at a rate of ¾% of the purchase price.

2. All the fuel is temporarily stored in ground storage tanks from which it is pumped into the aircraft fuel tanks, almost always immediately prior to flight departure. All the fuel is burned by flights in interstate or foreign commerce.**

3. The actual amounts of fuel burned over Illinois by United's flights can be determined with great accuracy. Of the fuel temporarily stored by United at the Chicago airports and loaded aboard its departing planes only a relatively small percentage is actually burned in Illinois, and this only by a limited number of those departing flights.

The record shows that every single flight lands in Illinois with enough fuel to take it from this State on the Federal Aviation Administration assigned route it actually used in departing from this State. The fuel on United's arriving flights is extremely chilled because of low temperatures encountered in high altitude flight. The much warmer fuel loaded at Chicago stratifies in the aircraft tanks above the cold, landed layer of fuel, which is drawn off from the bottom of these tanks to propel the aircraft on its outgoing interstate flight. This cold fuel represents from 1.7 to 7.0 times the fuel actually needed for the aircraft to depart from Illinois on FAA assigned routes.

This ratio of cold landed fuel to warm loaded fuel is particularly high on east, north and northwest departure routes which comprise 64.30% of United's flights from Chicago, so that no (or *de minimis* amounts of) Illinois-laden fuel is actually consumed by these flights in Illinois. A significant percentage of the remaining departures to the west also

** No intrastate flights are involved in this litigation.

consume in Illinois no more than *de minimis* amounts of Illinois-laden fuel. (See U.Br. pp. 18-20, 43-44, especially the table on p. 20.)

Of course, the fuel not burned in Illinois by United's departing flights is transported from Illinois in the tanks of the aircraft and is burned in other States.

A substantial portion of the fuel loaded in Illinois must, according to FAA safety Regulations, be on board when the flight lands at its destination in another State. Such fuel cannot and will not be burned in Illinois or even outside Illinois by the departing flight. It actually is used by United on other flights that occur after the plane has landed in another State and has commenced another interstate flight, say from Milwaukee to Los Angeles. (U.Br., pp. 18-19.) Such fuel is for use in another State in the same way as would fuel hauled by land from O'Hare to a Wisconsin airport as mentioned in the illustration (quoted at p. 5, *infra*) in this Court's opinion.

4. From August 1955, when the use tax was enacted, to June 3, 1963, the Department of Revenue uniformly and consistently applied a "burn-off" formula to tax only that portion of the fuel actually consumed in or over Illinois. (U.Br., pp. 23-24, 51-53.) Its abrupt change to its present position was not based on any change of the statute or on any judicial decision.

## ARGUMENT

### I.

### THE COURT'S DECISION WOULD DEPRIVE ALL COMMON CARRIERS OF THE BENEFITS OF THE TEMPORARY STORAGE PROVISION FOR ALL FUEL LOADED BY THEM IN ILLINOIS FOR USE IN THEIR INTESTATE OPERATIONS EVEN THOUGH THE FUEL IS USED OUTSIDE ILLINOIS. THIS VIOLATES THE COMMERCE CLAUSE AND CONFLICTS WITH THE MANIFEST INTENTION OF THE LEGISLATURE.

The Court's opinion principally holds that United is not entitled to the benefits of the temporary storage provision of the Use Tax Act (Ill. Rev. Stat. 1961/69, ch. 120, § 439.3) because United:

> ". . . does not store in Illinois *with any intention* that the fuel will be used solely outside this State. Rather, the fuel is stored here only to facilitate United's *operations from* the O'Hare and Midway airports within the State. Under the circumstances, the 'storage' becomes something more than a 'temporary storage' for safekeeping subsequent [prior?] to its use solely outside of Illinois." (Emphasis added.)

This immediately follows the statement that:

> "It is clear that if United was to withdraw its fuel from storage at Des Plaines and the airports and transport it outside the State *for use elsewhere*, as for example *at* an airport in nearby Wisconsin, the exemption would apply and neither the storage, nor the withdrawal, nor the transportation of the fuel outside the State would be uses subject to the tax." (Emphasis added.)

Several basic conclusions flow from these two propositions.

First, temporary storage of fuel in the ground tanks at the Chicago airports is the type of storage included within the scope of the temporary storage provision. The Court's example of shipping fuel to Wisconsin from such storage confirms this.

Second, that same example recognizes that the acts of withdrawal from storage and transportation from the State do not remove stored goods from the protection of the temporary storage provision. As the Court correctly saw, to have held otherwise would have nullified that provision entirely.

Third, if, as the Court has concluded, the temporary storage provision normally extends to withdrawal from storage and transportation from the State, it follows inexorably that the word "used" in the phrase "used solely" must mean something different from the broad statutory definition (*id.*, § 439.2) of "exercise of dominion" over the property.

What act then is it that removes the protection of the temporary storage provision? Or in terms of the statute, what is meant by "used" in the phrase "used solely" as applied to a consumable good such as fuel? In the context of the issues of this case, the "use" required must be consumption of the fuel by burning.*

Fourth, the Court's illustration also indicates that a withdrawal and shipment of a portion of the fuel from the storage tanks at the Chicago airports to Wisconsin would be free of tax even though the balance of the fuel

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* United submits that if words of the statute are to be given their plain and ordinary meaning, as the opinion states they should, fuel is "used" when it is burned. This Court has so indicated, without exception, in other cases under the ROT and Use Tax Acts, as reviewed in United's Brief, pp. 31-35, and in the *Amicus Curiae* main Brief, pp. 11-12.

remaining in storage at the Chicago airports were used in Illinois. This must mean that the "used solely" test is to be applied on individual withdrawals from storage, in contrast to taxing all fuel in ground storage because some is used in Illinois. Thus, the concept of fungibility is recognized at least to this extent.

Fifth, the Wisconsin example also discloses that the *method* by which fuel is transported from the State is decisive in the Court's application of the temporary storage provision. If fuel is loaded in Illinois in the tanks of an aircraft (or locomotive or other vehicle), it is outside the protection of the temporary storage provision, regardless of the fact that none so loaded in the tanks of that particular aircraft is actually burned within Illinois. No statutory basis for this distinction is cited.

**A. The Court's Opinion Incorrectly Applies the Temporary Storage Provision to Fuel Stored and Loaded in Illinois by Interstate Carriers.**

If the storage of fuel at the Chicago airports, and the ancillary withdrawal from storage and transportation from the State, normally would be protected by the temporary storage provision, what removes the fuel loaded aboard United's aircraft at Chicago airports from this protection? The Court's opinion answers this by stating that the *ground storage* itself at the Chicago airports is not within the temporary storage provision because United:

> "... does not store in Illinois *with any intention* that the fuel will be used solely outside this State. Rather, the fuel is stored only to facilitate United's *operations from* the O'Hare and Midway airports within the State." (Emphasis supplied.)

The rationale of this passage is unclear. The most literal interpretation is that the Court characterized the mere

storage of fuel by United *to facilitate its operations from* the Chicago airports as a type of storage which is not protected by the temporary storage provision. Expressed in another way, this would mean that the stored fuel is subject to tax because—and only because—it is being held for interstate flights departing from Illinois. If this is the interpretation intended, it constitutes a direct burden on interstate commerce, as is explained more fully in Part B (at pp. 9-11, *infra*).

If the passage is intended to mean that all fuel stored at the Chicago airports is taxable because some of it is burned within Illinois by some departing flights, the opinion applies the word "solely" to fungible goods in a way that is unlikely to have been the Legislature's intention. Moreover, such an approach departs from a considerable body of authority to the effect that the fungibility of goods is recognized in the application of the ROT and use tax, as is more fully developed in Part C (at pp. 11-13, *infra*).*

As a preliminary matter, United submits that the Court has interpolated a new standard into the temporary storage provision contrary to the express language of the statute. The temporary storage provision applies when the property stored here in fact *is* used solely outside this State, and not upon whether it is *intended to be* used solely outside Illinois.

But even if the taxpayer's intention is engrafted onto the statute, there is nothing in the record that discloses United's intention as to where the fuel is to be burned,**

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* If, although unlikely from the language used, the Court meant that the temporary storage provision was not applicable because every departing flight burns some Illinois-laden fuel, this would be subject to the foregoing objection, and in addition would be contrary to the record as outlined above (pp. 3-4, *supra*) and shown in United's Brief (pp. 18-20, 42-48).

** As has been already established at p. 6, *supra*, in the context of this case "use" must mean burning of the fuel.

apart from the reasonable inference that United intends the fuel to be burned where it knows it will be burned. Since United does know, it does not matter whether intent to use or actual use is the relevant standard.

**B. The Court's Interpretation Violates the Commerce Clause Because in Effect It Imposes Use Tax on Fuel Stored in Illinois by Common Carriers Only Because It Is Stored for Use in Their Interstate Operations from Illinois.**

The Court misapplies *Edelman* v. *Boeing Air Transport, Inc.*, 289 U.S. 249 (1933), to justify the imposition of the use tax under the facts of this case. That case and other authority cited in United's Brief (p. 62) establish that a State may impose a non-discriminatory tax on the storage of fuel, or its withdrawal from storage, which will not be prohibited merely because the tax is imposed on fuel immediately prior to its use to propel an instrumentality of interstate commerce. Contrary to the situation in the instant case, none of those cases involved a tax on storage or withdrawal that was imposed *only* because the fuel was stored by a common carrier to use in its interstate operations from the State.

Thus, as the temporary storage provision is construed in this Court's opinion, the incidence of the tax really is on the commitment of (or the intent to commit) the fuel to interstate operations. This is squarely prohibited by *Helson & Randolph* v. *Kentucky*, 279 U.S. 245, 249-252 (1929); *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157 (1954); *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U.S. 90, 92-94 (1937); *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 427, 433-34 (1947); *Richfield Oil Corp.* v. *State Board of Equalization*, 329

U.S. 69, 84 (1946); *Texas Gas Transmission Corp.* v. *Benson*, 444 S.W.2d 137, 139 (Tenn. 1969).*

The effect of the instant decision of the Court is to *condition* the availability of the temporary storage provision to common carriers on the fuel *not* being used by them to facilitate the operation of interstate flights departing from this State. Ever since *Western Union Telegraph Co.* v. *Kansas*, 216 U.S. 1, 30-37 (1910), holding that Kansas could not impose a capital stock fee computed on the *total* authorized capital of Western Union as a condition to conducting local business in Kansas, such a condition has been clearly unconstitutional. See *e.g.*, *Quaker City Cab Co.* v. *Pennsylvania*, 277 U.S. 389 (1928) (State cannot impose upon a foreign taxicab company, as a condition of doing business locally, a tax invalid under the Equal Protection Clause); *Frost & Frost Trucking Co.* v. *Railroad Commission*, 271 U.S. 583 (1926) (State cannot constitutionally affix to privilege of using highways the condition that a carrier assume all the burdens and duties of a common carrier); *Terral* v. *Burke Const. Co.*, 257 U.S. 529 (1922) (State law invalid which requires foreign corporation, as a condition of continuing to do business, to refrain from resorting to Federal courts).**

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* See also *Bingaman* v. *Golden Eagle Western Lines, Inc.*, 297 U.S. 626, 629 (1936); *McCarroll* v. *Dixie Greyhound Lines, Inc.*, 309 U.S. 176, 180 (1940), *rehearing denied*, 309 U.S. 696; *Mid-Continent Air Express Corp.* v. *Lujan*, 47 F.2d 266, 267-68 (D. N.M. 1931).

** The impermissibility of a State's imposing unconstitutional conditions upon the exercise of a legally protected activity continues to be reiterated by the courts. See, *e.g.*, *Garrity* v. *New Jersey*, 385 U.S. 493, 500 (1967); cf. *Watson* v. *Employers Liability Corp.*, 348 U.S. 66, 73 (1954); *id.* at 78-81 (Franfurter, J., concurring and reviewing authorities); *Patton* v. *North Carolina*, 381 F.2d 636, 640 fn. 10 (4th Cir., 1967), *cert. deined*, 390 U.S. 905 (1968). See generally Note, *Unconstitutional Conditions*, 73 Harv. L. Rev. 1595 (1960).

The unconstitutional condition doctrine of the *Western Union* case and its progeny has been adopted and applied by this Court. *Missouri Pacific R.R. Co.* v. *Public Utilities Commission*, 292 Ill. 427, 429-433 (1920); *U.S. Borax Corp.* v. *Carpentier*, 14 Ill.2d 111, 117-118 (1958).

**C. The Failure to Recognize the Fungibility of the Fuel in Applying the "Used Solely" Requirement is Unreasonable in Light of the Facts and Departs from Precedents of this Court.**

United previously posited (p. 8, *supra*) that the Court may have reached its result on the theory that the requirement of sole use outside Illinois was not fulfilled, because, of all the fuel temporarily stored by United at the Chicago airports, some may be burned in Illinois by some of its departing flights—or alternatively, that the Court concluded that *all* departing flights burn at least some small amount of Illinois-laden fuel.

Both alternatives proceed from the unstated premise that the Legislature must have intended the word "solely" to be narrowly construed without regard to the special nature of fungible goods, despite the fact that the Legislature has recognized their special nature by general legislation since it adopted the Uniform Sales Act in 1915. (See *Amicus Curiae* Reply Brief, p. 6.)

The Court's conclusion constitutes a departure from its consistent recognition of the concept of fungibility in other cases interpreting the ROT and Use Tax Acts. See *Granite City Steel Co.* v. *Department of Revenue*, 30 Ill.2d 552, 559-60 (1964); *Columbia Quarry Co.* v. *Department of Revenue*, 40 Ill.2d 47, 50-51 (1968), and the discussion in United's Brief (pp. 36-42). Without exception, these cases establish the proposition that fungible goods such as fuel are not to be treated as if they were a unitary article such as a

car or a hammer. Any use of a unitary item constitutes the use of the whole. In contrast, use of 10 "units" of fungible goods is use of those 10 units, but not use of 90 other units that may have been stored with the 10 at some time or other. Fuel is not burned in the huge ground storage tanks at O'Hare. It is not burned by the planeful. It is burned in the engines by individual drops or, more precisely, molecules. The fuel which is not burned while the plane is over Illinois is being *transported* from the State after temporary ground storage, and therefore remains within the scope of the temporary storage provision, whether or not it is deemed to be in "storage" in the plane's storage tanks.

Perhaps this point can be illustrated by the example of an electric utility which temporarily stores several hundred miles of copper cable (that it purchased outside Illinois) in a Chicago warehouse. If it strings this cable from a power plant near Chicago to Milwaukee, only that portion of the cable actually strung in Illinois would be deemed used in Illinois so as to remove it from the temporary storage provision. The portion used in Wisconsin would not be subjected to use tax merely because some of the cable originally stored with it had been used in Illinois—or, expressed in terms of the statute, because all of the stored cable had not been *"used solely"* outside Illinois. The fact that cable used both within and without Illinois had been temporarily stored in the same warehouse would not lead to the conclusion that none of it was exempt from Illinois use tax because all the goods stored together at one time were not "used solely" outside Illinois.

The foregoing result would be the same whether the cable were taken from the warehouse in several separate withdrawals, or if it were removed by a single shipment from which the cable was strung partly in Illinois and partly in Wisconsin.

By parity of reasoning, of the fuel stored at the Chicago airports, only those amounts actually burned in Illinois should be outside the scope of the temporary storage provision. This applies equally to withdrawals for departing flights which do not burn in Illinois any Illinois-loaded fuel, and by the same principles to flights which burn some Illinois-laden fuel within the State. To conclude otherwise is to impose a use tax on some 250,000,000 gallons of aviation fuel temporarily stored by United each year in Illinois and loaded aboard some 85,000 annual departing flights because a fraction of such fuel is burned on a limited number of those flights.

In contrast to such an unrealistic result is the logic of the burn-off rule: that fuel withdrawn from storage in Illinois which is burned in Illinois is taxable by this State.

As was shown in detail in United's Brief (pp. 49-50, 17 fn.), which departing flights burn fuel in Illinois and which do not readily can be established. Of those that do, the amount actually burned can be accurately determined so that the State is fully protected.

**D. The Court's Decision Does Not Conform to the Overall Legislative Purpose.**

The preceding analysis is supported by the fact that the Court's opinion does not seem to conform to the manifest legislative purpose.

The temporary storge provision is introduced by language in the statute declaring that its purpose is to "prevent actual or likely multistate taxation." This decision results in actual multistate taxation. All fuel involved in this litigation is purchased in Indiana by United, and is subject to the ¾% Indiana gross income tax, so that the Illinois use tax is the second State tax imposed on the fuel temporarily stored in Illinois.

As previously mentioned (p. 7, *supra*) the opinion squarely distinguishes between fuel transported by United from O'Hare to Milwaukee by ground transportation and such fuel transported to that same city in the tanks of aircraft, the former being within the scope of the temporary storage provision and the latter not. Inasmuch as in both cases the fuel would be intended for use and actually used between Milwaukee and other points, the only distinction between the two is the method of transportation from Illinois to Wisconsin. There is nothing in the statutory language to support this distinction.

Finally, it is difficult to understand how the Court concludes that the Legislature intended the temporary storage provision to be unavailable to common carriers in their normal operations. The legislative history of the Use Tax Act, outlined in the Amicus Curiae Brief (pp. 19-26), demonstrates clearly that both the temporary storage provision and the related rolling stock provision were intended to protect common carriers from multistate taxation in their interstate operations.

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In light of this analysis, United submits that the language of the temporary storage provision, as applied to the storage and use of fuel by common carriers, is not so "plain, simple and unambiguous" as to lead to the conclusion reached by the Court.

## II.

## THE HELSON CASE DOES NOT PROHIBIT A USE TAX MEASURED BY FUEL WITHDRAWN FROM STORAGE IN ILLINOIS AND BURNED IN ILLINOIS IN INTERSTATE COMMERCE BECAUSE THERE IS A LOCAL EVENT UPON WHICH TO IMPOSE SUCH TAX.

The *per curiam* opinion declined to follow the rule of contemporaneous administrative construction in part be-

cause of the belief that the doctrine of *Helson & Randolph* v. *Kentucky*, 279 U.S. 245 (1929), makes the burnoff rule unconstitutional.

*Helson* involved a Kentucky gasoline tax which was imposed upon the use of fuel within the State. There the interstate carrier purchased fuel in Illinois, which was brought into Kentucky in the fuel tanks of a river ferry. The only contact that fuel had with Kentucky was that it supplied the propulsive power for the interstate ferry across the Ohio River. The fuel was neither stored nor withdrawn from storage in Kentucky and had therefore never acquired a local taxable situs. Thus, the only possible incidence of the Kentucky tax was upon the consumption of the fuel in interstate commerce. Obviously, such a tax was a direct, unconstitutional burden upon interstate commerce.

Under the Illinois Use Tax Act, a tax is imposed upon the storage of fuel, or its withdrawal from storage—*except* to the extent that such storage and withdrawal are exempt under the temporary storage provision. Storage and withdrawal are local events that occur before any interstate transportation or consumption is commenced, and hence constitute a permissible basis to sustain a use tax under the Commerce Clause. See *Edelman* v. *Boeing Air Transport, Inc.*, 289 U.S. 249 (1933) and other authority cited in United's Brief (p. 62). Thus, United constitutionally may be subjected to the use tax whenever it stores fuel in Illinois that does not qualify under the temporary storage provision. The fuel burned in Illinois cannot qualify—because obviously it is "used" in Illinois—and, therefore, the tax which has already been incurred under the statute must be paid on that fuel. But the incidence of this tax is

the antecedent local event, the storage or withdrawal from storage at the Chicago airports, and the principle established by *Helson* is not applicable.

It is well established that if there is a proper local event upon which to base a tax, it may be *measured by interstate activities*, including fuel consumption within the taxing state by vehicles moving in interstate commerce. See *McCarroll* v. *Dixie Greyhound Lines, Inc.*, 309 U.S. 176, 178-79 (1940), holding that highway carriers engaged in interstate journeys may constitutionally be required to pay a State tax measured by the number of gallons of fuel burned within the taxing State by the carrier's vehicles which use the State's highways. See also *Thompson* v. *Continental Southern Lines, Inc.*, 222 Ark. 108, 257 S.W.2d 375, 377 (1953); *Larey* v. *Continental Southern Lines, Inc.*, 243 Ark. 278, 419 S.W.2d 610, 614 (1967); *Department of Revenue* v. *Greyhound Corp.*, 321 S.W.2d 60, 61 (Ky. 1959); *Lake Shore Coach Lines, Inc.* v. *Alger*, 327 Mich. 146, 41 N.W.2d 503, 508 (1950); *Mason & Dixon Lines, Inc.* v. *Commonwealth*, 185 Va. 877, 41 S.E.2d 16, 19-20 (1947), *cert. denied*, 331 U.S. 807 (1947).*

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* In various other circumstances in which a local aspect of interstate commerce was properly subject to State taxation, the courts have sustained a tax measured by the activities carried on within the taxing jurisdiction. See, *e.g.*, *Alaska* v. *Arctic Maid*, 366 U.S. 199, 203-05 (1961) (occupation tax on freezer ships measured by value of fish obtained for processing); *Asiatic Trans-Pacific Inc.* v. *Maddox*, 371 F.2d 132, 134-35 (9th Cir. 1967) (where services as agent for van and storage companies were performed in Guam, privilege tax measured by gross receipts from services was permissible); *Higman Towing Co.* v. *Cocreham*, 70 F. Supp. 628, 635 (E.D.La. 1947), *aff'd*, 165 F.2d 789 (5th Cir. 1948) (sustained income tax on petroleum transportation company measured by number of barrels transported and mileage they were transported within taxing State).

This Court has given effect to the foregoing principle in *Bode* v. *Barrett*, 412 Ill. 204, 219-26 (1952).

It follows from all this authority that the *per curiam* opinion's objection to a tax "measured" by burn-off is unfounded.

The relevance of the *Helson case* to this situation can be tested from a broader perspective. The belief that *Helson* precludes taxing *part* of the fuel loaded at the Chicago airports, is the first step in a reasoning sequence which leads to the conclusion that *all* the fuel loaded in Illinois can be taxed—even amounts burned outside Illinois. It seems anomalous to conclude that a tax on all the fuel, including that burned outside Illinois, constitutes less of a burden on interstate commerce than a tax on only that part actually burned in Illinois. The United States Supreme Court's decisions which have protected interstate commerce against undue State interference hardly can be read as calling for such a peculiar result.

## III.

## THE RULE OF CONTEMPORANEOUS ADMINISTRATIVE CONSTRUCTION SHOULD BE FOLLOWED IN THIS CASE TO UPHOLD THE BURN-OFF RULE WHICH IS A PERMISSIBLE CONSTRUCTION OF THE LEGISLATIVE INTENTION.

The Court's opinion recognizes that there is a rule

> ". . . that courts, in determining the proper construction of an ambiguous statute, will consider and give weight to the contemporaneous construction placed upon a statute by the governmental officers or departments charged with the duty of administering it, and will usually adopt such contemporaneous construction where it is a reasonably permissible construction, has the implied assent of the legislature, and has been consistent, uniform and long continued."

Here the contemporaneous construction is entitled to even greater weight, since it was announced *before* the Use Tax Bill was signed by the Governor, in response to a request for an interpretation on this precise point by one of the Legislature's managers of the Bill. The interpretation by the Department of Revenue in 1955 thus is a clear indication not only of what that Department thought the law meant on this point, but also of what the Governor intended it to mean before he signed the Bill. It is therefore entitled to be regarded as an expression of legislative understanding and not merely as a subsequent statement of administrative position.

The fact that the Department of Revenue changed its mind in 1963 obviously is not evidence of the intention of the Legislature at the time the law was passed in 1955. The Department's abrupt reversal, not based on any legislation or court desision, of its original position seems to be more akin to legislation by it rather than an effort to carry out the Legislature's intention, particularly in light of the fact that the Legislature had amended the very section of the Use Tax Act which contains the temporary storage provision in every Session from 1955 to 1963 without upsetting the burn-off rule of which its Tax Committees' members were well aware.

The four Justices comprising the majority of the Court have concluded that the statutory language is so clear and unambiguous as to justify a holding that the law meant the opposite of what those responsible for its enactment stated that it meant. With deference, this is a remarkable conclusion. The United States Supreme Court, though recognizing the "plain meaning rule", has emphasized that: "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" *United States* v. *American*

*Trucking Associations, Inc.*, 310 U.S. 534, 543-544 (1940). The "literal interpretation dogma" (*ibid.*) was also said not to justify disregard of available information as to what was originally intended. Indeed, "[t]he very legislative materials which respondent would exclude refute his assumption. It would be anomalous to close our minds to persuasive evidence of intention on the ground that reasonable men could not differ as to the meaning of the words." *United States* v. *Dickerson*, 310 U.S. 554, 562 (1940).

This Court found the statutory language clear in not permitting storage in the wing tanks to be treated as storage, although conceding that this might be storage "in a special or technical sense". This in itself establishes that "storage" can be used in different senses, and would therefore seem to justify resort to external material casting light on what actually was intended at the time the Act was passed.

The majority of four Justices is also of the view that the storage in the ground tanks before loading is not covered by the exemption because the fuel is not "used solely" outside Illinois. This position must be based on the assumption that the Legislature necessarily and unambiguously meant that the normal rule governing the treatment of fungible products did not apply. United submits that the discussion above (pp. 11-13, *supra*) demonstrates that the Legislature cannot have clearly and unambiguously intended to act in disregard of this general principle, particularly when at the time of enactment it was told that the specific statute provision was *not* to be so construed.

Two of the Justices in the majority in effect conclude that to construe "temporary storage" as covering the unburned fuel being transported from Illinois in the wing tanks would be contrary to the constitutional doctrine enunciated in *Helson*. We believe this an erroneous read-

ing of that decision, for reasons previously stated (pp. 15-17, *supra*). As was observed earlier, to hold that the Commerce Clause permits taxation of all the fuel loaded in United's interstate flights departing from Illinois, *including that burned outside Illinois*, but precludes taxation of only that portion of such fuel actually burned in Illinois, is certainly anomalous.

For these reasons, United respectfully submits that it cannot persuasively be said that the statutory language clearly and unambiguously means the opposite of what those responsible for the law stated at the time it was enacted, and which they uniformly followed for many years thereafter, or that their expression of understanding is irrelevant. When the principle that taxing statutes are to be strictly construed in favor of taxpayers is added to the scales, (see authority cited, U. Br. pp. 57-58), we submit that the result must be that the statute should be construed as it was by everyone during its first eight years.

Accordingly, United prays (a) that the judgment of the trial court be reversed and this cause be remanded as originally requested in United's Brief (p. 69) or (b) that this case be reargued before the Court.

Respectfully submitted,

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[8] UNITED STATES OF AMERICA

STATE OF ILLINOIS
SUPREME COURT } ss.

AT A TERM OF THE SUPREME COURT, begun and held in Springfield, on Monday, the thirteenth day of September in the year of our Lord, one thousand nine hundred and seventy-one, within and for the State of Illinois.

Present: Robert C. Underwood, Chief Justice
Justice Walter V. Schaefer — Justice Thomas E. Kluczynski
Justice Daniel P. Ward — Justice Charles H. Davis
Justice Joseph H. Goldenhersh — Justice Howard C. Ryan
William J. Scott, Attorney General
Robert G. Miley, Marshal
Attest: Justin Taft, Clerk

BE IT REMEMBERED, that, to-wit: on the 4th day of October, A.D. 1971, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

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UNITED AIR LINES, INC.,
Appellant
No. 42042 vs.
THEODORE A. JONES, Director of Revenue of the Department of Revenue of the State of Illinois, WILLIAM G. CLARK, Attorney General of the State of Illinois, ADLAI E. STEVENSON, III, Treasurer of the State of Illinois, and Shell Oil Co., a Delaware corporation,
Appellees

Appeal from Circuit Court Cook County 68 C 17049

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And now, on this day, the Court having duly considered the petition for rehearing filed herein, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a rehearing in this cause.

[9] IN THE SUPREME COURT OF ILLINOIS

| | |
|---|---|
| UNITED AIR LINES, INC., Plaintiff-Appellant, vs. GEORGE E. MAHIN, Director of Revenue of the Department of Revenue of the State of Illinois, et al., Defendants-Appellees. | No. 42042 |

## ORDER

This cause having come on to be heard on the motion of plaintiff-appellant United Air Lines, Inc., to stay issuance of the mandate in the above action,

IT IS HEREBY ORDERED, pursuant to Illinois Supreme Court Rule 368(c) that the issuance of the aforesaid mandate of this Court be and is hereby stayed until completion of appeal proceedings in the above action before the United States Supreme Court.

DANIEL P. WARD
Justice

October 13, 1971

[10] No. 42042

IN THE
SUPREME COURT OF ILLINOIS

UNITED AIR LINES, INC.,
Plaintiff-Appellant,
vs.
GEORGE E. MAHIN, Director of Revenue of the Department of Revenue of the State of Illinois, WILLIAM J. SCOTT, Attorney General of the State of Illinois, ADLAI E. STEVENSON, III, Treasurer of the State of Illinois, and SHELL OIL CO., a Delaware corporation,
Defendants-Appellees.

## NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that United Air Lines, Inc., the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Illinois, entered April 1, 1971, rehearing denied, October 4, 1971.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

MARK H. BERENS
Counsel for Appellant

Filed:

Mayer, Brown & Platt
231 South LaSalle Street
Chicago, Illinois 60604

FILED
DEC. 20, 1971
JUSTIN TAFT, CLERK

## TRIAL EXHIBITS

United Exhibit 1 is attached as Exhibit B to Amended Complaint, page 19, *supra*.

United Exhibit 2 is attached as Exhibit C to Amended Complaint, page 21, *supra*.

United Exhibit 3 is attached as Exhibit D to Amended Complaint, page 23, *supra*.

United Exhibit
PACIFIC TIME
MOUNTAIN TIME
CENTRAL TIME
EASTERN TIME
DISCOVER AMERICA
VANCOUVER B.C.
SEATTLE-TACOMA
PORTLAND
SALEM
EUGENE
MEDFORD
BOISE
ELKO
RENO
SALT LAKE CITY
OGDEN
GRAND JUNCTION
LAS VEGAS
SACRAMENTO
STOCKTON
MODESTO
MERCED
FRESNO
VISALIA
BAKERSFIELD
SAN FRANCISCO-OAKLAND
MONTEREY-SALINAS
SANTA BARBARA
LOS ANGELES
SAN DIEGO
HONOLULU
HILO
TORONTO
MINNEAPOLIS-ST. PAUL
DULUTH
SAULT STE. MARIE
SAGINAW-BAY CITY-MIDLAND
DETROIT
FLINT
GRAND RAPIDS
BATTLE CREEK
SOUTH BEND
MILWAUKEE
CHICAGO
ROCKFORD
PEORIA
SPRINGFIELD
ST. LOUIS
KANSAS CITY
OMAHA
DES MOINES
ROCK ISLAND
DAVENPORT
CLEVELAND
AKRON-CANTON
COLUMBUS
DAYTON
CINCINNATI
INDIANAPOLIS
EVANSVILLE
LOUISVILLE
MEMPHIS
NASHVILLE
BIRMINGHAM
NEW ORLEANS
MOBILE
CHATTANOOGA
KNOXVILLE
ATLANTA
CHARLESTON W. VA.
CHARLESTON S.C.
GREENSBORO-HIGH POINT-WINSTON-SALEM
FAYETTEVILLE
RALEIGH-DURHAM
CHARLOTTE
ASHEVILLE
GREENVILLE-SPARTANBURG
AUGUSTA
COLUMBIA
SAVANNAH
JACKSONVILLE
TAMPA-ST. PETERSBURG
MIAMI
WEST PALM BEACH
ORLANDO
BALTIMORE
WASHINGTON
NEWPORT NEWS-HAMPTON
WILMINGTON
NORFOLK-PORTSMOUTH
PHILADELPHIA
ALLENTOWN-BETHLEHEM-EASTON
HARRISBURG
PITTSBURGH
YOUNGSTOWN
ERIE
BUFFALO
ROCHESTER
SYRACUSE
ALBANY
NEW YORK
NEWARK
BOSTON
MANCHESTER
PROVIDENCE

**United Exhibit 7**

United's Aircraft Fleet
as of
December 31, 1967

| Type of Aircraft | Schedule Service | Support Aircraft | Grounded Aircraft | Total |
|---|---|---|---|---|
| Jet | 205 | 30 | 0 | 235 |
| Jet-prop | 28 | 2 | 11 | 41 |
| Piston | 62 | 19 | 0 | 81 |
| Total | 295 | 51 | 11 | 357 |

**United Exhibit 8**

United's Average Passenger Volumes
at O'Hare Field
Third Quarter 1967

| A. *Interstate* | Per Day |
|---|---|
| Originating Passengers Enplaned | 3855 |
| Destination Passengers Deplaned | 3889 |
| Passengers Carried Through Chicago | 1114 |
| Passengers Connecting Between United Flights | 3872 |
| Passengers Connecting Between United and Other Carriers | 7744 |
| Total Daily Passenger Volume at Chicago | 20474 |

| B. *Intrastate* | Per Day |
|---|---|
| Local Chicago-Moline, Moline-Chicago Passengers | 155 |

United Exhibit 9

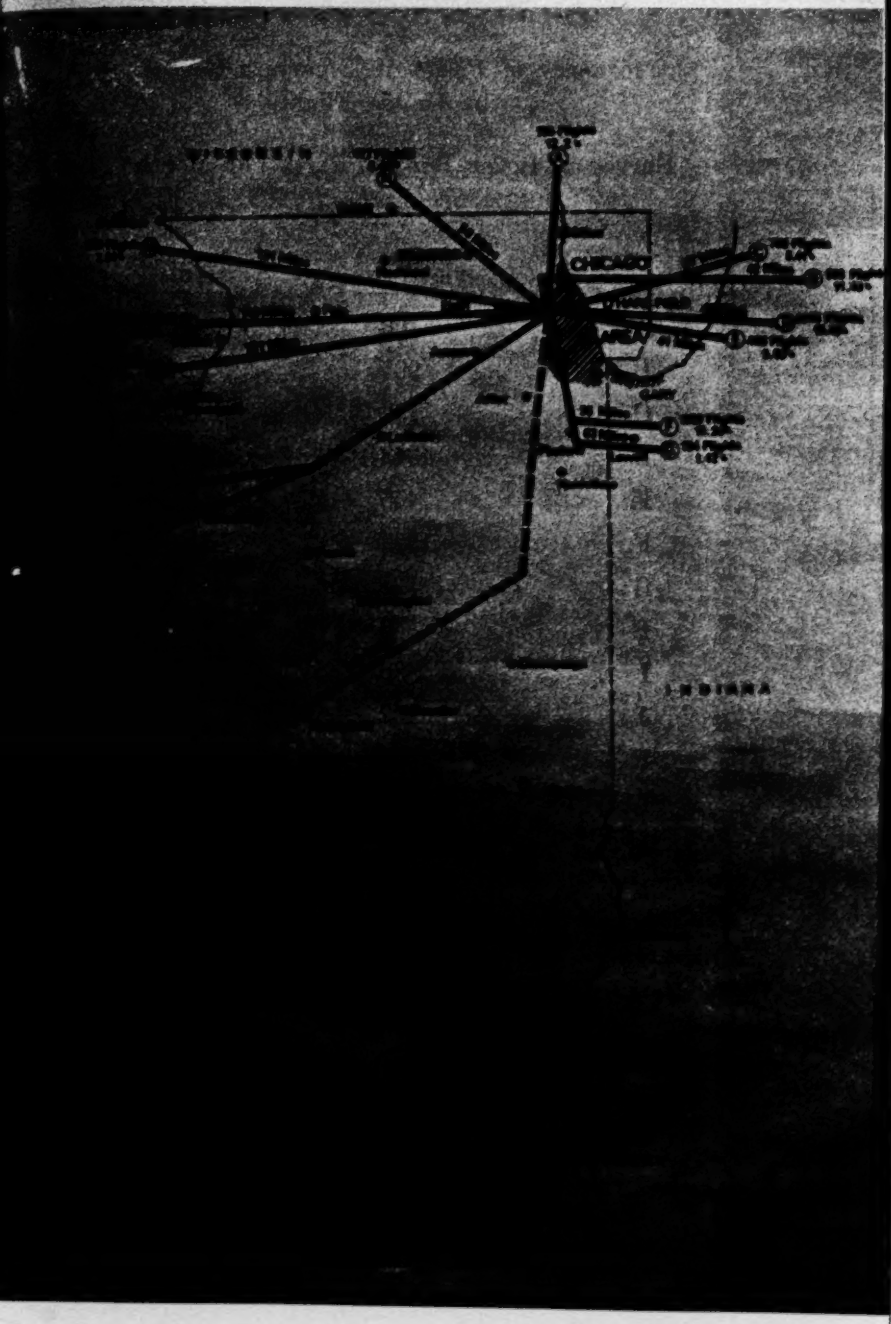
## Ground Times of United's Aircraft Operating at O'Hare Field

### October 1967 Schedule

| Aircraft Type | Through Flights | | Short Turnaround Flights | |
|---|---|---|---|---|
| | Number | Average Time on Ground | Number | Average Time on Ground |
| Jet Passenger Aircraft | 132 | 46.3 min. | 30 | 1 hr. 42 min. |
| Propeller Passenger Aircraft | 32 | 40.2 min. | 10 | 1 hr. 56 min. |
| Subtotal Passenger Aircraft | 164 | 45.1 min. | 40 | 1 hr. 46 min. |
| Jet Cargo Aircraft | 7 | 1 hr. 43 min. | 1 | 1 hr. 40 min. |
| Propeller Cargo Aircraft | — | — | 1 | 3 hr. 29 min. |
| Subtotal Cargo Aircraft | 7 | 1 hr. 43 min. | 2 | 2 hr. 35 min. |
| Total | 171 | 47.4 min. | 42 | 1 hr. 52 min. |

**United's Departure Routings from Illinois**

**United Exhibit 20**



United Exhibit 21

## Frequency of Usage of Departure Routes by United Flights

### Survey of Seven Random Days Per Month July 1967—January 1968

| Route | Number of Flights Using | Percentage of Usage |
|---|---|---|
| A | 106 | 1.22 |
| B | 995 | 11.43 |
| C | 732 | 8.41 |
| D | 1343 | 15.43 |
| E | 486 | 5.58 |
| F | 1329 | 15.26 |
| G | 124 | 1.42 |
| H | 3 | 0.03 |
| I | 90 | 1.03 |
| J | 232 | 2.66 |
| K | 1842 | 21.16 |
| L | 308 | 3.54 |
| M | 639 | 7.34 |
| N | 477 | 5.48 |
| Total | 8706 | 100.00 |

United Exhibit 23

MAY 18 1964

FEDERAL AVIATION AGENCY
WESTERN REGION
Air Carrier District Office 34
8055 East 32nd Avenue
Denver, Colorado 80207

EXOVF
MAY 18 1964

| | |
|---|---|
| D. R. PETTY | |
| L. E. [illegible] | ✓ |
| J. M. HODGSON | |
| C. M. Christensen | |
| J. G. BROWN | |
| E. T. CULLERTON | |
| J. D. SMITH | |
| W. E. DUNKLE | |
| W. L. EKEDL | |
| R. C. BARTLETT | |
| G. B. POT | |
| R. J. REED | |
| SECRETARY | |
| FILE | SFO |

IN REPLY REFER TO: 8400

May 15, 1964
13

RECEIVED
MAY 18 1964

Mr. D. R. Petty
Senior Vice President
Flight Operations
United Air Lines, Inc.
P. O. Box 8800
Chicago, Illinois 60666

Dear Mr. Petty:

Cpy MK/FST

This is in regard to your request for approval of your B-727 Flight Manual.

This office has completed the review of your manual and found it to comply with the requirements of the regulations.

Please include the following statement in your preface pages to the B-727 Manual:

"The B-727 Flight Manual provides the information essential to proper operation of the airplane. Further, it contains all pertinent procedures and information found in the FAA Approved Airplane Flight Manual. Where procedures in the B-727 Flight Manual differ from those contained in the FAA Approved Airplane Flight Manual for this airplane, United Air Lines has determined that equivalent safety is provided by such alternate procedures and assumes full responsibility for such determination."

Sincerely,

Hiram Breiles
Operations Inspector

## Fuel Burn-Out from O'Hare Field to the Illinois Border

| Route* | Statute Miles | Type of Aircraft | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | | DC-8 (JT3D-1) | DC-8 (JT4A-3) | DC-8 (JT3D-3) | Boeing 720 | Boeing 727 | Boeing 727 Cargo | Caravelle |
| A | 35 | 4770 | 5050 | 4850 | 4590 | 2960 | 3140 | 1860 |
| B | 57 | 5840 | 6330 | 5920 | 5730 | 3640 | 3920 | 2500 |
| C | 42 | 5080 | 5410 | 5230 | 4930 | 3190 | 3410 | 2070 |
| D | 41 | 5030 | 5350 | 5170 | 4880 | 3160 | 3380 | 2040 |
| E | 41 | 5030 | 5350 | 5170 | 4880 | 3160 | 3380 | 2040 |
| F | 55 | 5770 | 6220 | 5830 | 5620 | 3590 | 3870 | 2440 |
| G | 63 | 6120 | 6640 | 6190 | 6010 | 3820 | 4110 | 2640 |
| H | 265 | 11540 | 13360 | 11620 | 11860 | 7660 | 8280 | 6180 |
| I | 207 | 10070 | 11590 | 10130 | 10360 | 6680 | 7260 | 5210 |
| J | 176 | 9290 | 10630 | 9350 | 9540 | 6160 | 6720 | 4700 |
| K | 121 | 7890 | 8940 | 7950 | 8120 | 5230 | 5670 | 3780 |
| L | 116 | 7750 | 8780 | 7810 | 8000 | 5140 | 5560 | 3690 |
| M | 131 | 8140 | 9240 | 8210 | 8390 | 5400 | 5910 | 3960 |
| N | 58 | 5910 | 6390 | 5970 | 5790 | 3680 | 3960 | 2520 |

* Routes as designated in Exhibit 20.

United Exhibit 25

## Reserve Fuel Requirements for United's Aircraft

| Type of Aircraft | Type of Engine | FAA Reserve Requirement (Pounds) | Additional United Reserve Requirement (Pounds) | Total Fuel Reserve (Pounds) |
|---|---|---|---|---|
| DC-8 (JT3D-1) | jet | 8000 | 4000 | 12000 |
| DC-8 (JT4A-3) | jet | 8500 | 4000 | 12500 |
| DC-8 (JT3D-3) | jet | 8000 | 4000 | 12000 |
| Boeing 720 | jet | 8000 | 4000 | 12000 |
| Boeing 727 | jet | 5400 | 2700 | 8100 |
| Boeing 727 Cargo | jet | 5400 | 2700 | 8100 |
| Caravelle | jet | 4000 | 2000 | 6000 |
| Viscount | turbo-prop | 2200 | 1000 | 3200 |
| DC-7 | piston | 1890 | 1000 | 2890 |
| DC-7B | piston | 1890 | 1000 | 2890 |
| DC-6/6B | piston | 1350 | 1000 | 2350 |
| DC-6A | piston | 1350 | 1000 | 2350 |

Note: One gallon of turbine fuel (for turbo-prop and jet engines) equals approximately 6.8 pounds. One gallon of aviation gasoline (for piston engines) equals approximately 6 pounds).

United Exhibit 26—Page One

## Survey of Fuel on United's Flights Arriving at O'Hare

### August 1963 Survey

| Type of Aircraft | Number of Flights Surveyed | Average Fuel on Board (Pounds) | Below FAA Minimum | Below UAL Minimum |
|---|---|---|---|---|
| four-engine, jet (DC-8, Boeing 720) | 2003 | 21463 | 6 (.03%) | 28 (1.4%) |
| Caravelle | 604 | 11550 | 5 (.83%) | 17 (2.8%) |
| Viscount | 521 | 5888 | 2 (.38%) | 3 (.58%) |
| DC-7/7B | 153 | 5654 | 1 (.65%) | 2 (1.31%) |
| DC-6/6A/6B | 1219 | 4789 | 2 (.16%) | 11 (.90%) |
| TOTAL | 4500 | — | 16 (.36%) | 61 (1.36%) |

United Exhibit 26—Page Two

## Survey of Fuel on United's Flights Arriving at O'Hare

### 1967 Survey

| Type of Aircraft | Number of Flights Surveyed | Average Fuel on Board (Pounds) | Below FAA Minimum | Below UAL Minimum |
|---|---|---|---|---|
| DC-8 (JT3D-1) | 279 | 24400 | 0 | 3 (1.08%) |
| DC-8 (JT4A-3) | 624 | 22500 | 0 | 9 (1.44%) |
| DC-8 (JT3D-3) | 349 | 25500 | 0 | 1 (.29%) |
| Boeing 720 | 2944 | 22000 | 0 | 21 (.71%) |
| Boeing 727 | 7009 | 16100 | 0 | 17 (.24%) |
| Boeing 727 Cargo | 610 | 15300 | 0 | 1 (.16%) |
| Caravelle | 1781 | 13000 | 0 | 1 (.06%) |
| TOTAL | 13596 | — | 0 | 53 (.39%) |

United Exhibit 27

## Comparison of Reserve Fuel, Landing Fuel and Burn-Out

| Aircraft Type | F.A.A. Reserve | United Reserve | Average Landing Fuel Aug. 1968 | Median Landing Fuel 1967 Survey | Burn-Out to Illinois Border Over Routes | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | A | B | C | D | E | F | G | H | I | J | K | L | M | N |
| DC-8 (JT3D-1) | 8000 | 12000 | 21463 | 24400 | 4770 | 5840 | 5080 | 5030 | 5030 | 5770 | 6120 | 11540 | 10070 | 9290 | 7890 | 7750 | 8140 | 5910 |
| DC-8 (JT4A-3) | 8500 | 12500 | 21463 | 22500 | 5040 | 6330 | 5410 | 5350 | 5350 | 6220 | 6640 | 13360 | 11590 | 10630 | 8940 | 8780 | 9240 | 6390 |
| DC-8 (JT3D-3) | 8000 | 12000 | 21463 | 25500 | 4850 | 5920 | 5230 | 5170 | 5170 | 5830 | 6190 | 11620 | 10130 | 9350 | 7950 | 7810 | 8210 | 5970 |
| Boeing 720 | 8000 | 12000 | 21463 | 22000 | 4590 | 5730 | 4930 | 4880 | 4880 | 5620 | 6010 | 11860 | 10360 | 9540 | 8120 | 8000 | 8390 | 5790 |
| Boeing 727 | 5400 | 8100 | — | 16100 | 2960 | 3640 | 3190 | 3160 | 3160 | 3590 | 3820 | 7660 | 6680 | 6160 | 5230 | 5140 | 5400 | 3680 |
| Boeing 727 Cargo | 5400 | 8100 | — | 15300 | 3140 | 3920 | 3410 | 3380 | 3380 | 3870 | 4110 | 8280 | 7260 | 6720 | 5670 | 5560 | 5910 | 3960 |
| Caravelle | 4000 | 6000 | 11550 | 13000 | 1860 | 2500 | 2070 | 2040 | 2040 | 2440 | 2640 | 6180 | 5210 | 4700 | 3780 | 3690 | 3960 | 2520 |

Defendant's Exhibit No. 1—Leasing agreement between Shell Oil Company and United Air Lines covering the storage facilities located at Des Plaines, Illinois, dated December 1, 1959, with amendments, is as follows:

MAYER, FRIEDLICH, SPIESS, TIERNEY,
BROWN & PLATT
231 South La Salle Street
Chicago, Illinois 60604

February 6, 1968

EUROPEAN OFFICE
4 Place De La Concorde
Paris 8e
Anjou 45-23

STate 2-0600
CABLES
LEMAY, CHICAGO
LEMAYLAW, PARIS

BY MESSENGER

Calvin C. Campbell, Esq.
Assistant Attorney
State of Illinois Building
160 North LaSalle Street
Chicago, Illinois

Dear Calvin:

Enclosed pursuant to your recent telephone request is a copy of the Lease, dated December 1, 1959, from Shell Oil Company jointly to American Airlines Inc., Capital Airlines Inc. (since merged into United) and United Air Lines Inc., together with copies of all of the Amendments (7) thereto.

Sincerely yours,
MARK H. BERENS
Mark H. Berens

MHB:mjr
Enclosures

## LEASE

THIS IS A LEASE, dated December 1, 1959, between SHELL OIL COMPANY, a Delaware corporation with offices at 50 West 50th Street, New York 20, New York (herein called "Shell"), and AMERICAN AIRLINES, INC., with offices at 100 Park Avenue, New York 17, New York; CAPITAL AIRLINES, INC., with offices at Washington National Airport, Washington 1, D. C.; and UNITED AIR LINES, INC., with offices at 5959 South Cicero Avenue, Chicago 38, Illinois (herein called individually "Lessee" and collectively "Lessees"):

1. DEMISE. Shell hereby leases to Lessees, and Lessees hereby lease from Shell, the following described land situated in Elk Grove Township, Cook County, Illinois:

> The West 540 feet of the North Three-Fourths of the West Half (W ½) of the Southeast Quarter (SE ¼) of Section 23 (excepting the North 60 feet and the South 1,175 feet thereof), in Township 41 North, Range 11 East of the Third Principal Meridian;

together with: (a) an easement of ingress and egress to and from said land and Algonquin Road, over a roadway (herein called "Roadway") to be located where Shell chooses (and subject to relocation from time to time if Shell chooses), to be constructed by and at the expense of Shell, and to be used jointly by Lessees and Shell and their and its respective licensees and invitees; and (b) the building, tanks, piping and other facilities located on said land, described in Exhibit A hereof (herein collectively called "Facilities" or, with said land, "Premises"); and (c) the right to operate and use the one 12-inch-diameter receiving pipe line running from Badger Pipe Line Company's Meter Station easterly to and into the Premises, and the two parallel 6-inch-diameter

delivery pipe lines running from the Premises southerly to O'Hare Field, together with all equipment appurtenant thereto, as also described in Exhibit A (and herein collectively called "Pipe Lines"); but Shell reserves the right, for itself and for any other parties to whom it may grant the like right, from time to time in the future to operate and use the Pipe Lines in common with Lessees; provided that such right of Shell or any other party shall always be subordinate to Lessees' prior right to operate and use the Pipe Lines at such times and for such periods as Lessees' respective businesses may reasonably require, and shall be exercised always at the sole risk and expense of Shell or such other party (as the case may be); and provided, further, that so long as Lessees' aggregate movements of petroleum products through the Pipe Lines exceed a monthly average of 10,000 barrels per day, such right of Shell or any other party shall not be exercised, without the prior written consent of Lessees, for any movement through the Pipe Lines which is not part of a continuous pipe line movement, in interstate commerce, of petroleum products tendered by and consigned to the same shipper for such shipper's own consumption at destination. The locations of the Premises and the Pipe Lines are shown on Shell's Drawing GD-1769 (dated 5-22-59) which is attached hereto. Except when and to the extent that Shell has consented otherwise in writing, the Premises shall be used only for the storage and handling, and the Pipe Lines only for the movement, of aviation fuels purchased and received from Shell at East Chicago, Indiana (herein called "Shell's Aviation Fuels"). Except when otherwise expressly specified, Lessees' obligations under this Lease shall be joint and several.

2. ADDITIONAL LESSEES. If at any time during the continuance of this Lease any airline or other company not then a party to this Lease desires to have Shell's Aviation Fuels stored and handled on the Premises and moved through the Pipe Lines, such company may, at Shell's

option, become, and have all the rights of, a Lessee hereunder, effective not later than the date on which any of such Fuels are first delivered to the premises for such company's account; provided (a) that such company shall first have entered into a written agreement with Shell to perform and observe all of the covenants and conditions of this Lease on the part of Lessees to be performed and observed (whether severally or jointly and severally), as fully as though such company were named herein as a Lessee, and (b) that such company shall have met all reasonable requirements of the other Lessees with respect to its sharing of their joint obligations hereunder and its use of the Facilities and the Pipe Lines.

3. TERM. The term of this Lease shall be eight (8) years and eleven (11) months, beginning December 1, 1959, and ending October 31, 1968; provided that: (a) if at any time any Lessee no longer desires to have Shell's Aviation Fuels stored and handled on the Premises and moved through the Pipe Lines, such Lesses may terminate this Lease with respect to such Lessee alone, by giving at least thirty (30) days' prior notice to Shell; except that the Lessees named herein may not exercise this termination privilege effective prior to October 31, 1964, as to American Airlines, Inc., to December 31, 1962, as to Capital Airlines, Inc., or to December 31, 1963, as to United Air Lines, Inc.; and (b) if at any time any Lessee fails, for any cause, reasonably within its control and for at least two successive calendar months, to have any of Shell Aviation Fuels either stored or handled on the Premises or moved through the Pipe Lines, Shell may terminate this Lease with respect to such Lessee alone, forthwith by notice to such Lessee. No termination of this Lease shall relieve any or all of Lessees of any obligation to Shell which has accrued hereunder prior to the effective date of such termination, nor shall

any termination with respect to any Lessee alone, affect in any way the continuance of this Lease in full force and effect as to the other Lessees.

4. RENT. As a several and not joint obligation, each Lessee shall pay to Shell, as rent for each calendar month during the continuance of this Lease as to such Lessee, Two-tenth of One Cent (0.20¢) for each gallon of aviation turbine fuel and Three-tenths of One Cent (0.30¢) for each gallon of aviation gasoline, delivered to any pipeline or other transportation facility for delivery to the Premises by or for the account of such Lessee; provided that, for any month during which any aviation gasoline whatsoever is in storage on the Premises by or for the account of any one or more of Lessees, the rent for such month, with respect to such gasoline and whether or not any thereof is so delivered during such month for delivery to the Premises, shall be not less than $1,575.00, which shall be the sole obligation of that Lessee (if there is but one), or the joint and several obligation of those Lessees (if there are more than one), by or for the account or accounts of which such gasoline was in such storage (each Lessee being free at any time wholly to discontinue such storage of such gasoline).* Rent for each month shall be invoiced to each Lessee at such address as such Lessee may designate by notice to Shell, and shall be payable within 15 days after receipt of such invoice, at Shell's office at 8500 North Michigan Road, Indianapolis, Indiana, or at such other place as Shell may designate by notice to each Lessee.

5. USE. Lessees shall observe and comply with all Federal, State and Municipal laws, ordinances, regulations,

---

* It is mutually agreed, however, that these rental payments of $1,575.00 per month will not commence until the tank farm on O'Hare Field is fully completed and capable of receiving aviation gasoline for lessees' storage requirements. Contract completion date for this project is approximately November 15, 1960.

orders, licenses and permits relating to the Premises or the Pipe Lines, to any use thereof or to any activity thereon or therewith. Lessees shall pay all charges incident to Lessees' use of the Premises or the business conducted thereon, or the Pipe Lines, including all license, permit, occupation and inspection taxes and fees, all water, gas, electricity, telephone and other utility charges (no meters or accounts for which shall be in Shell's name), and all taxes on Lessees' property on the premises; and if Lessees fail to pay any of such charges or taxes which are or may become liens on the Premises, and are not being in good faith protested or contested by Lessees, Shell may pay the same and charge such payments to Lessees. Shell shall pay all property taxes on the Premises and the Pipe Lines. Lessees shall not make any attachments or additions to, or any structural alterations of, any building or tank on the Premises, or the Pipe Lines, or construct any additional buildings or structures on the Premises, or paint or place any signs on any such building, tank or structure, without Shell's prior written consent (which shall not be unreasonably withheld).

6. MAINTENANCE AND INSURANCE OF THE PREMISES. Lessees shall at all times keep the Premises neat and clean and maintain the same in good order and repair. Lessees shall promptly repair or replace any of the Facilities damaged, destroyed or otherwise in need of repair or replacement, by any cause other than the perils covered by a standard fire and extended coverage insurance policy (herein called "insured perils"), or the negligence of Shell or its agents or employees; and if Lessees fail so to do, Shell may make such repairs or replacements and charge to Lessees the actual cost thereof. Shell shall (and shall be exclusively entitled to) insure the Facilities against the insured perils, to their full insurable value, with insurers of Shell's selection, with loss payable to Shell, and with waiver of subrogation against Lessees and any operating agent

of Lessees. In the event of damage or destruction of any of the Facilities by any of the insured perils, Shell shall repair or replace the same; but if the Premises are rendered unfit for occupancy by any cause (whether or not among the insured perils), either Shell or Lessees may terminate this Lease forthwith by notice to the other. Shell shall have the right to enter the Premises at any time for the purpose of inspecting the same and making repairs, replacements and additions.

7. OPERATION AND MAINTENANCE OF THE PIPE LINES. Lessees' operation and use of the Pipe Line shall be conducted solely by and at the expense of Lessees. Shell shall maintain the Pipe Lines in good operating condition and repair, at Shell's expense; except that Shell may charge to Lessees the actual cost of any repair or replacement of the Pipe Lines necessitated by any wanton or negligent act or omission of Lessees or their agents or employees. On notice from Shell (which may be oral) Lessees shall suspend their operation of the Pine Lines whenever and so long as Shell deems it necessary to effect repairs or replacements; provided that the commencement and/or the continuance of any such suspension shall be accommodated as much as reasonably possible to Lessees' convenience, except when there is, in Shell's sole judgment, an emergency which cannot await such accommodation. Lessees shall give Shell prompt notice (which may be oral) of any condition of or affecting the Pipe Lines which does or may necessitate any repair or replacement thereof.

8. TEMPORARY PIPE LINE. Pursuant to letter-agreements with the Lessees named herein, each dated October 28, 1959, Shell has constructed on O'Hare Field a temporary extension of the delivery lines portion of the Pipe Lines to those Lessees' storage tanks on that Field, the location of which extension is shown on Shell's Drawing GD-1818-2 (dated 10-4-59, 2nd rev. 11-59) which is attached

hereto. Such temporary extension (including its appurtenances) shall be deemed included in the Pipe Lines, but subject to the provisions of the respective letter-agreements (which shall be deemed incorporated herein), and also to the provisions of this Lease insofar as they are not inconsistent with those of the letter-agreements; provided that Shell's right reserved in article 1, for itself and other parties, to operate and use the Pipe Lines shall not extend to such temporary extension.

9. ROADWAY MAINTENANCE. The Roadway, as located (or relocated) and constructed by Shell, shall be maintained by Lessees in good condition and repair; but Shell shall reimburse Lessees, upon demand from time to time, for that proportion of the actual reasonable cost to Lessees of such maintenance, which is fairly allocable to Shell, having regard to the nature and volume of, the normal wear and tear resulting from, and any specific damage caused by, the respective uses of the Roadway by and for the benefit of Lessees and Shell.

10. INDEMNITY. Lessees shall indemnify Shell against any and all claims, suits, liability and expense on account of injury or death of persons or damage to property caused by or happening in connection with the condition of the Premises, or Lessees' or their operating agent's maintenance, possession or use thereof, or any operations thereon, or the use of the Roadway by or for the benefit of any or all of Lessees, or the condition, operation or use of the Pipe Lines by or for the account of any or all of Lessees, and not caused by the negligence of Shell or its agents or employees.

11. ASSIGNMENT-SUBLEASING. Neither Lessees jointly nor any Lessee severally shall assign or encumber this Lease or any of their or its interests hereunder, or sublease all or any part of the Premises or the Pipe Lines,

or permit any other party, to occupy or use the same, without Shell's prior written consent (which shall not be unreasonably withheld); except that Lessees may permit any party of their selection to occupy, use and operate the Premises and the Pipe Lines as their operating agent, if such party has (as Lockheed Air Terminal, Inc. hereby has) Shell's prior written approval, and so long as such approval is not withdrawn by Shell by notice to Lessees (which approval shall not be either withheld or withdrawn unreasonably or without prior discussion with Lessees).

12. REMEDIES. If any Lessee defaults in payment of its rent, or initiates bankruptcy or insolvency proceedings, or fails to effect dismissal within 60 days of any such proceeding initiated against it, or makes an assignment for the benefit of creditors, or if any Lessee's interest in or under this Lease becomes vested, by operation of law or otherwise, in any other person, firm or corporation: Shell may, at its option and without notice, terminate this Lease as to such Lessee alone, and remove and exclude such Lessee from further possession of the Premises and the Pipe Lines, without prejudice to any other rights or remedies of Shell against such Lessee, or to the continuance of this Lease in full force and effect as to the other Lessees. If Lessees default in performance or observance of any of their joint and several obligations under this Lease, and fail to remedy such default within thirty (30) days after Shell gives Lessees notice thereof, Shell may, at its option and without notice, wholly terminate this Lease and re-enter and repossess the Premises and the Pipe Lines, without prejudice to any other rights or remedies of Shell. At any termination of this Lease as to any Lessee, or at any termination (including the expiration) thereof as to all Lessees, each Lessee shall remove from the Premises all of its own equipment, aviation fuels and other property then located thereon, within ninety (90) days after such termination;

and if any Lessee fails so to do, Shell may remove such property from the Premises and charge to such Lessee the actual cost of removing and storing the same.

13. NOTICES. All notices hereunder shall be given by registered letter or telegram, and shall be deemed given when the letter is deposited in the mail or the telegram filed with the telegraph company, postage or charges prepaid and addressed: if to Shell, at Shell's address first herein specified; if to any individual Lessee, at such Lessee's address first herein specified, or specified in a written agreement pursuant to article 2; and if to Lessees jointly, care of Lockheed Air Terminal, Inc. at .....
.....; or to such other respective addresses as may be substituted by proper notice hereunder.

14. ENTIRETY-EXECUTION. This Lease merges and supersedes all prior negotiations, representations and agreements, and constitutes the entire contract, between Shell and Lessees concerning the leasing of the Premises and the use of the Pipe Lines and the Roadway, and the consideration therefor, excepting the letter-agreements referred to in article 8. Neither this Lease nor any subsequent amendment or supplement thereto shall be binding on Shell unless and until it is signed in Shell's behalf by a duly authorized representative.

15. PILING. American Airlines, Inc. shall file this Lease with the Civil Aeronautics Board pursuant to Section 412 of the Federal Aviation Act of 1958; and each of the other Lessees concurs in such filing.

IN WITNESS WHEREOF, this Lease is executed as of the date first herein written.

SHELL OIL COMPANY
By M. W. DISCHERT
Manager
Real Estate Department

AMERICAN AIRLINES, INC.
By F. C. WISER
Vice Pres.—Technical Svcs.

CAPITAL AIRLINES, INC.
By ROBERT J. WILSON

UNITED AIR LINES, INC.
By CURTIS BARKES
Senior Vice President—
Finance and Property

## EXHIBIT A

**To Lease dated December 1, 1959, between Shell Oil Company and American Airlines, Inc., Capital Airlines, Inc. and United Air Lines, Inc.**

**Buildings, Tanks, Piping and Other Facilities Located on the Land described in Article 1 of the Lease.**

*Buildings*

1—12′ x 18′ Insulated Butler type building on slab foundation with water, sewage, electrical and heating facilities.

*Tanks*

Welded steel constructed in accordance with API specifications 12-C.

1—112 MB Floating Roof Tank 117′ dia. x 48′ Ht.
2—55 MB Floating Roof Tank 85′ dia. x 48′ Ht.
1—25 MB Floating Roof Tank 67′ dia. x 40′ Ht.
2—2 MB Cone Roof Tank 20′ dia. x 36′ Ht.

Above tankage equipped with standard appurtenances including swing lines, automatic gauges, mid-point thermometers, drains, stairways and necessary tank connections and valves.

*Earthwork and Tank Foundations*

Earthen dikes of sufficient size to hold 110% of tank capacities.

One (1) 12-foot wide gravel road across terminal property to manifold and office area, including access ramps to all tanks.

Concrete ring wall type foundations under the three (3) largest tanks and gravel mat type foundation under the three (3) smaller tanks.

*Terminal Receiving Piping*

Terminal receiving piping consisting of 12-inch diameter receiving manifold, valves and operators, gravitometer and pump, sump pump, 8-inch diameter secondary manifold and valves, individual tank fill lines, and electric power and controls for above pumps and valve operators.

*Slop Pump and Piping*

One (1) 20 HP slop loading, blending, or transfer pump with necessary manifold, valves and tank connections, including 4-inch diameter line to truck bottom loading facilities at the Northeast corner of terminal property.

*Delivery Piping*

Delivery piping consisting of 6-inch diameter tank suction piping from product tanks to individual products pumps and manifolds, pump discharge piping and controls to 6-inch diameter lines to O'Hare Air Field and 6-inch diameter transfer line to secondary manifold.

*Product Delivery Pumps*

1—100 HP 600 GPM Vertical cal A/C Pump and Motor.
1—40 HP 475 GPM Vertical al A/C Pump and Motor.

*Electrical*

All necessary transformers, s, switch gear, distributor and control circuits, including two (o (2) yard flood lights.

*Fire Extinguishing Equipment nt*

3—25-pound CO-2 hand fire e extinguishers.

*Fence*

Entire terminal enclosed by y 6-foot high chain link type fence, including entrance gat ate.

**The Pipe Lines Referred to i o in Article 1 of the Lease**

*Twelve-inch Receiving Lateral hl from Badger Meter Station*

One (1) 12-inch diameter pipe peline from Badger Pipe Line Meter Station to terminal r receiving manifold approximately 2,400 feet in length, in including required valves and insulating assemblies.

*Two 6-inch Delivery Lines to O O'Hare Air Field*

Two (2) parallel 6-inch diame meter pipelines from terminal shipping manifolds and pum imps to O'Hare Field future airline storage area approxim imately 15,500 feet in length, including required regulatio ion valves, filter separators, manifold tie-ins, manifold val valves and controls.

SHELL OIL COMPANY
50 West 50th Street
New York 20, N. Y.
September 23, 1960

Capital Airlines, Inc.
Washington National Airport
Washington 1, D.C.

Attention Mr. R. W. Schwank
Director of Procurement and Supply

Gentlemen:

Reference is made to the Lease between Shell Oil Company, as lessor, American Airlines, Inc., Capital Airlines, Inc. and United Air Lines, Inc., as Lessees, dated December 1, 1959, covering land and facilities in Elk Grove Township, Cook County, Illinois, and particularly to article 8 thereof, as well as the October 28, 1959, letter agreements referred to therein, relating to the temporary pipe line on O'Hare Field.

As necessitated by the O'Hare Airport construction program, we propose to relocate approximately 1500 feet of the temporary pipe line to the temporary refueling points and receiving facilities, all in accordance with our attached plans numbered GC-640 and GC-1982 and attached estimate of cost of $17,500.00. Plans and specifications will be approved by the City of Chicago through Naess and Murphy, its architects, and the work will be performed by our contractors on an open end contract.

We propose to receive reimbursement for this relocation expenditure by making additional charges to the named Lessees using the temporary pipe line, at the rate of 0.28 cent per gallon of aviation fuels pumped through that line until we have recovered the cost to us of such relocation.

When the temporary pipe is no longer required, we propose to dismantle it and make such charges against, and issue such credits to the named Lessees, as provided in the letter agreements of October 28, 1959.

This proposal is conditioned upon acceptance by all of the named Lessees. If it meets with your approval, kindly signify your acceptance by signing in the space below and returning to us the accompanying copy of this letter.

Very truly yours,
SHELL OIL COMPANY
By GEORGE G. HUGHES

Agreed:
CAPITAL AIRLINES, INC.
By ROBERT J. WILSON

Estimate—O'Hare Field
Piping and Strainer Changes

Stage I—Install 1550'—6" Diameter Incoming Line, Relocate ½ Strainer Installation, and Install 2 Vv Manifold

a. Install 1550'—6" Diameter Pipe

| | |
|---|---|
| *Materials* | |
| 1550'—6" Diameter Sch 40 | $ 2,500 |
| 1—6" Diameter Gate Vv | 220 |
| 1—6" Diameter Mueller Pot | 300 |
| *Installation* | |
| Welding—Mueller | 300 |
| Welding—Line | |
| 36—6" Diameter @ $16 | 580 |
| Ditching and Road Boring | 500 |
| Lay and Carry—1550' @ .25/ft. | 360 |
| Mueller Operation (Including Rental) | 1,000 |
| Total Pipe Installation | $ 5,750 |

| | |
|---|---|
| **b. Relocate ½ Strainer Installation** | |
| ***Materials*** | |
| Concrete and Reinforcing Rod | |
| 11 cy @ $15 | $ 165 |
| Rod | 50 |
| Weld Fittings | 175 |
| ***Installation*** | |
| Foundation | 750 |
| Move Strainers | 750 |
| Welding | |
| 4″ Diameter—21 @ $11 | 231 |
| 6″ Diameter— 6 @ $16 | 128 |
| Make-up Piping and Drain-up | |
| Existing | 1,500 |
| Total Strainer Installation | $ 3,750 |
| **c. Install 2 Vv Manifold** | |
| ***Materials*** | |
| Weld Fittings | $ 335 |
| ***Installation*** | |
| Welding | |
| 3—6″ Diameter @ $16 | $ 50 |
| 10—4″ Diameter @ $11 | 110 |
| Make-up Piping and Drain-up | |
| Existing | 500 |
| Total 2 Vv Manifold Installation | $ 995 |
| Sub Total State I | $10,495 |

Stage II—Remove 2780'—6" Pipe and Strainer Foundation, and Relocate ½ Strainer

| | |
|---|---|
| a. Remove 2780'—6" Existing Pipe and Strainer Foundation | |
| Remove 2780'—6" Diameter Pipe @ $0.50/ft. | $ 1,390 |
| (Less Credit for Pipe) | (1,120) |
| Remove Strainer Foundation | 750 |
| Total Removal | $ 1,020 |
| b. Relocate and Install ½ Strainer | $ 2,000 |
| Sub Total Stage II | $ 3,020 |
| Total Stages I and II (Piping) | $13,515 |

Electric and Control Facilities

| | |
|---|---|
| Installation | |
| Mat'l | $ 750 |
| Labor | 1,000 |
| Removal Cost | 200 |
| | $ 1,950 |
| Engineering and Expenses | $ 485 |
| Contingencies—10% | 1,550 |
| Grand Total | $17,500 |

## FIRST AGREEMENT AMENDING LEASE

THIS IS AN AGREEMENT, dated Oct. 6, 1961, between SHELL OIL COMPANY, a Delaware corporation ("Shell"), and AMERICAN AIRLINES, INC., CAPITAL AIRLINES, INC., and UNITED AIR LINES (collectively "Lessees"), with reference to the Lease between them dated December 1, 1959, of Premises, including land and Facilities, situated in Elk Grove Township, Cook County, Illinois,

THAT, effective as of October 27, 1960:

1. The description in article 1 of the Lease, of the land situated in Elk Grove Township, Cook County, Illinois, is amended to read as follows:

> The West 540 feet of the North Three-Fourths of the West Half of the Southeast Quarter of Section 23 (except the South 1175 feet thereof) in Township 41 North, Range 11 East of the Third Principal Meridian; also
> The East 334 feet of Lot 3 in Friedrich Busse, Jr.'s Division of Land in Section 23, Township 41 North, Range 11 East of the Third Principal Meridian as recorded February 20, 1911, in Office of Recorder of Cook County, in Book 113 of Plats, Page 21, as Document No. 4709799.

2. Exhibit A attached to the Lease is replaced and superseded by, and clause (b) of article 1 of the Lease shall be deemed to refer to, Exhibit A (First Revision) which is attached to this Agreement.

3. The antepenultimate sentence of article 1 of the Lease shall be deemed to refer not only to Shell's drawing GD-1769 (dated 5-22-59) which is attached to the Lease, but also to Shell's Drawing GD-1777-5 (dated 2-26-60, last revised 2/61), which is attached to this Agreement.

4. With respect to the land described in article 1 hereof which is additional to that described in original article 1 of

the Lease, and with respect to the tanks and other facilities described in Exhibit A (First Revision) which are in addition to, or described in any way differently from, those described in Exhibit A: the latter are included in the Facilities and, together with the additional land, included in the Premises, and are hereby leased by Shell to Lessees and by Lessees from Shell, on all of the covenants and conditions of the Lease, all of which are hereby confirmed and continued.

5. The first sentence of article 8 of the Lease shall be deemed to refer to Shell's Drawing GD-1818-3 (dated 10-14-59, last revised 6/3/60), which is the second of the Drawings actually attached to the Lease.

6. The address of Lockheed Air Terminal, Inc., for the purpose of article 13 of the Lease, is Lockheed Air Terminal, Inc. P.O. Box 8784, O'Hare International Station, Chicago 66, Illinois.

EXECUTED as of the date first herein written.

SHELL OIL COMPANY
By M. W. DISCHERT
Real Estate Department

AMERICAN AIRLINES, INC.
By JAMES J. LAMOND, JR.

*CAPITAL AIRLINES, INC.
By .....

UNITED AIR LINES, INC.
By CURTIS BARKER
Executive Vice President—
Finance and Property

* Not executed by Capital Airlines, Inc. because of the merger effective June 1, 1961, of Capital into United Air Lines, Inc.

**EXHIBIT A (FIRST REVISION)**

**To Lease dated December 1, 1959, between Shell Oil Company and American Airlines, Inc. Capital Airlines, Inc. and United Air Lines, Inc.**

**Buildings, Tanks, Piping and Other Facilities Located on the Land described in Article 1 of the Lease.**

*Buildings*

1—12′ x 18′ Insulated Butler type building on a slab foundation with water, sewage, electrical and heating facilities.

*Tanks*

Welded steel constructed in accordance with API specifications 12-C.

2—112 MB Floating Roof Tank 120′ dia. x 56′ Ht.
2—55 MB Floating Roof Tank 85′ dia. x 56′ Ht.
1—25 MB Floating Roof Tank 67′ dia. x 40′ Ht.
2—2 MB Cone Roof Tank 20′ dia. x 36′ Ht.

Above tankage equipped with standard appurtenances including swing lines, automatic gauges, mid-point thermometers, drains, stairways and necessary tank connections and valves.

*Earthwork and Tank Foundations*

Earthen dikes of sufficient size to hold 110% of tank capacities.

One (1) 12-foot wide gravel road across terminal property to manifold and office area, including access ramps to all tanks. One (1) 12-foot wide gravel road from gate at NE corner of leased area to Tank DP-74 approximately 1100′ in length including ramp. Concrete ring wall type foundations under the four (4) largest tanks and gravel mat type foundations under the three (3) smaller tanks.

*Terminal Receiving Piping*

Terminal receiving piping consisting of 12-inch diameter receiving manifold, valves and operators, gravitometer and pump, sump pump, 6-inch diameter secondary manifold and valves, individual tank fill lines, and electric power and controls for above pumps and valve operators.

*Slop Pump and Piping*

One (1) 20 HP slop loading, blending, or transfer pump with necessary manifold, valves and tank connections, including 4-inch diameter line to truck bottom loading facilities at the Northeast corner of terminal property.

*Delivery Piping*

Delivery piping consisting of 6-inch diameter tank suction piping from product tanks to individual products pumps and manifolds, pump discharge piping and controls to 6-inch diameter lines to O'Hare Air Field and 6-inch diameter transfer line to secondary manifold.

*Product Delivery Pumps*

1—100 HP 600 GPM Vertical A/C Pump and Motor.
2—40 HP 475 GPM Vertical A/C Pump and Motor.

*Electrical*

All necessary transformers, switch gear, distributer and control circuits, including two (2) yard flood lights.

*Fire Extinguishing Equipment*

3—25-pound CO-2 hand fire extinguishers.

*Fence*

Entire terminal enclosed by 6-foot high chain link type fence, including entrance gate.

**The Pipe Lines Referred to in Article 1 of the Lease**

*Twelve-inch Receiving Lateral from Badger Meter Station*
One (1) 12-inch diameter pipeline from Badger Pipe Line Meter Station to terminal receiving manifold approximately 2,400 feet in length, including required valves and insulating assemblies.

*Two 6-inch Delivery Lines to O'Hare Air Field*
Two (2) parallel 6-inch diameter pipelines from terminal shipping manifolds and pumps to O'Hare Field airline storage area approximately 15,500 feet in length, including required regulation valves, filter separators, manifold tie-ins, manifold valves, controls, hay tanks, spheriod receiving barrel, meters and registres.

SHELL OIL COMPANY
50 West 50th Street
New York 20, N. Y.

November 8, 1962

United Air Lines, Inc.
P.O. Box 8800
Chicago 66, Illinois

Attention Mr. J. H. Stark
Petroleum Administrator

Gentlemen:

Effective as of November 1, 1962, we reduced the rent under your December 1, 1959, Lease of our Des Plaines Terminal (UAL Contract No. 11267), from $0.0020 per

gallon to $0.0010 per gallon, subject, however, to revocation by us in whole or in part at any time by written notice to you.

Yours very truly,
GEORGE G. HUGHES
G. G. Hughes, Manager
Aviation Sales—Central Area
Aviation Sales Department

United Air Lines, Inc., in acknowledging the aforesaid rate reduction, does so with the express understanding and agreement of Shell that in the event the amended rate is revoked in whole or in part as aforesaid, that the new rate so established by Shell, shallnot exceed in any event during the term of the subject agreement, the amount of $0.0015 per gallon. Will you kindly indicate your acknowledgment and agreement to this qualification by signing a copy of this letter in the space provided below and returning same to United.

READ, ACKNOWLEDGED, AND AGREED TO THIS 20th DAY OF NOVEMBER, 1962.
UNITED AIR LINES, INC.

By CURTIS BARKES
Title: Executive Vice President—Finance and Property

READ, ACKNOWLEDGED, AND AGREED TO THIS 30th DAY OF NOVEMBER, 1962.
SHELL OIL COMPANY

By GEORGE G. HUGHES
Manager Aviation Sales
Central Area
Aviation Sales Department

SHELL OIL COMPANY
50 West 50th Street
New York 20, N. Y.

February 1, 1963

United Air Lines, Inc.
P.O. Box 8800
Chicago 66, Illinois

Attention Mr. J. H. Stark
Petroleum Administrator

Gentlemen:

This refers to the letter agreement dated November 8, 1962 (UAL Contract No. 11267-3), in which we advised that effective November 1, 1962, we were reducing the rent under your December 1, 1959, lease of our Des Plaines terminal (UAL Contract No. 11267) to $0.0010 per gallon.

Please accept this as our notice that effective January 1, 1963, the rent has been increased from $0.0010 per gallon to $0.0015 per gallon.

Yours very truly,

George G. Hughes
G. G. Hughes, Manager
Aviation Sales—Central Area
Aviation Sales Department

## FIFTH AGREEMENT AMENDING LEASE

THIS IS AN AGREEMENT, dated June 10, 1964 between SHELL OIL COMPANY, a Delaware corporation ("SHELL"), and AMERICAN AIRLINES, INC., and UNITED AIR LINES (successor to Capital Airlines, Inc.) (collectively "Lessees"), with reference to the Lease between them dated December 1, 1959 (as amended), of

Premises, including land and facilities, situated in Elk Grove Township, Cook County, Illinois.

THAT, effective as of June 10, 1964

1. The description in article 1 of the Lease, of the land situated in Elk Grove Township, Cook County, Illinois, is amended to read as follows:

Starting at a point on the center line of section 23, township 41 north, range 1 east of the third principal meridian, located 825 feet south of the center of said section, said point being the "point of beginning" thence east along Shell's south property line 540 feet to a point, thence north 438 feet to a point, thence west 174 feet to a point, thence south 111 feet to a point, thence west 18 feet to a point, thence north 88 feet to a point, thence west 332 feet along the center line of a tank dike to a point, thence north 410 feet to a point, thence west 16 feet to the center of said section 23, thence west 337 feet to a point, thence south 825 feet to a point on Shell's south property line, thence east 337 feet to the point of beginning.

2. Exhibit A attached to the Lease is replaced and superseded by, and clause (b) of article 1 of the Lease shall be deemed to refer to, Exhibit A (Second Revision) which is attached to this Agreement.

3. The antepenultimate sentence of article 1 of the Lease shall be deemed to refer to Shell's drawings GD-1777-8 (dated 4/8/64, revised April 17, 1964), and CD-13-36-1 (dated 2/4/64) attached to this Agreement and supersedes both Drawings GD-1769 and GD-1777-5.

4. Article 3 of the Lease is amended to read and provide as follows: 3. Term. The term of this Lease shall be eleven (11) years and one (1) month, beginning December 1, 1959, and ending December 31, 1970; provided that: (a) if at any time any Lessee no longer desires to have

aviation fuels purchased from Shell stored and handled on the Premises and moved through the Pipe Lines, such Lessee may terminate this Lease with respect to such Lessee alone, by giving at least thirty (30) days' prior notice to Shell; except that this termination privilege may not be exercised by American Airlines, Inc., effective prior to October 31, 1966, or by United Air Lines, Inc., effective prior to December 31, 1970; and (b) if at any time any Lessee fails, for any cause reasonably within its control and for at least two successive calendar months, to have any of the aviation fuels purchased from Shell either stored or handled on the Premises or moved through the Pipe Lines, Shell may terminate this Lease with respect to such Lessee alone, forthwith by notice to such Lessee. No termination of this Lease shall relieve any or all of Lessees of any obligation to Shell which has accrued hereunder prior to the effective date of such termination, nor shall any termination with respect to any Lessee alone, affect in any way the continuance of this Lease in full force and effect as to the other Lessees.

5. The Lease, as heretofore and hereby amended, is confirmed and continued.

EXECUTED as of the date first herein written.

SHELL OIL COMPANY

By R. M. Adamson

AMERICAN AIRLINES, INC.

By H. J. Tillman

Regional Vice President—
Chicago

UNITED AIR LINES, INC.

By Curtis Barnes

Executive Vice President—
Finance and Property

**EXHIBIT A (SE ECOND REVISION)**

To Lease dated December r 1, 1959, between Shell Oil Company and American Airlines, s, Inc. Capital Airlines, Inc. and United Air Lines, Inc.

**Buildings, Tanks, Piping a and Other Facilities Located on the Land described i in Article 1 of the Lease.**

*Buildings*

1—12′ x 18′ Insulated Bu utler type building on a slab foundation with water, se ewage, electrical and heating facilities.

*Tanks*

Welded steel constructed in in accordance with API specifications 12-C.

1—120,000 barrel Floating R Roof Tank 124′ Dia. x 56′ ht. (Tank DP-73)

2—112,000 barrel Floating R Roof Tank 120′ dia. x 56′ ht. (Tanks DP-70 and DP-74)

2—2,000 barrel Cone Roof T Tank 20′ dia. x 36′ ht. (Tanks DP-90 and DP-91)

Above tankage equipped wi with standard appurtenances including swing lines, autom matic gauges, mid-point thermometers, drains, stairways and necessary tank connections and valves.

*Filtration Facility*

7—6 inch Dorr-Clone #2400 0 Filters

4—Commercial Filter Corpor oration Model 42M36 Clay Filters

2—Bendix "Go-No-Go" Filter rs Model 20-500 GPM #043005-(#720)

1—1,000 gallon Sump Tank

1—Tuthell Sump Pump

1—4 inch x 6 inch x 10½ CAM M Bingham Pump 125 H.P. Motor 3 phase, 60 cy cle, 440 volts 3600 RPM TEFC CL-1 Group p D

Explosion Proof Westinghouse Motor Frame 607S
1—Separator Box
Above facility equipped with necessary piping, manifolds and valves.

*Earthwork and Tank Foundations*

Earthen dikes of sufficient size to hold 110% of tank capacities.

One (1) 12-foot wide gravel road across terminal property to manifold and office area, including access ramps to all tanks. One (1) 12-foot wide gravel road from gate at NE corner of leased area to Tank DP-74 approximately 1100′ in length including ramp. Concrete ring wall type foundations under the three (3) largest tanks and gravel mat type foundations under the two (2) smaller tanks.

*Terminal Receiving Piping*

Terminal receiving piping consisting of 12-inch diameter receiving manifold, valves and operators, gravitometer and pump, sump pump, 6-inch diameter secondary manifold and valves, individual tank fill lines, and electric power and controls for above pumps and valve operators.

*Slop Pump and Piping*

One (1) 20 HP slop loading, blending, or transfer pump with necessary manifold, valves and tank connections, including 4-inch diameter line to truck bottom loading facilities at the Northeast corner of terminal property.

*Delivery Piping*

Delivery piping consisting of 6-inch diameter tank suction piping from product tanks to individual products pumps and manifolds, pump discharge piping and controls to two 6-inch diameter lines to O'Hare Air Field and 6-inch diameter transfer line to secondary manifold.

*Product Delivery Pumps*

1—100 HP 600 GPM Vertical A/C Pump and Motor.
2—40 HP 475 GPM Vertical A/C Pump and Motor.

*Electrical*

All necessary transformers, switch gear, distributor and control circuits, including two (2) yard flood lights.

*Fire Extinguishing Equipment*

3—25-pound CO-2 hand fire extinguishers.

**The Pipe Lines Referred to in Article 1 of the Lease**

*Twelve-inch Receiving Lateral from Badger Meter Station*

One (1) 12-inch diameter pipeline from Badger Pipe Line Meter Station to terminal receiving manifold approximately, 2400 feet in length, including required valves and insulating assemblies.

*Sixteen-inch Receiving Lateral from West Shore Meter Station*

One (1) 16-inch diameter pipe line from West Shore Pipe Line Meter Station to terminal receiving manifold approximately 2400 feet in length, including required valves and insulating assemblies.

*Two 6-inch Delivery Lines to O'Hare Air Field*

Two (2) parallel 6-inch diameter pipelines from terminal shipping manifolds and pumps to O'Hare Field airline storage area approximately 15,500 feet in length, including required regulation valves, filter separators, manifold tie-ins, manifold valves, controls, hay tanks, spheriod receiving barrel, meters and registers.

## SIXTH AGREEMENT AMENDING LEASE

THIS IS AN AGREEMENT, dated October 5, 1966 between SHELL OIL COMPANY, a Delaware corporation ("SHELL"), and AMERICAN AIRLINES, Inc., and

UNITED AIR LINES (successor to Capital Airlines, Inc.) (collectively "Lessees"), with reference to the Lease between them dated December 1, 1959 (as amended), of Premises, including land and facilities, situated in Elk Grove Township, Cook County, Illinois.

THAT, effective as of September 1, 1966,

1. The description in article 1 of the Lease, of the land in Elk Grove Township, Cook County, Illinois, is amended to read as follows:

> Starting at a point on the center line of section 23, township 41 north, range 1 east of the third principal meridian, located 825 feet south of the center of said section, said point being the "point of beginning" thence east along Shell's south property line 540 feet to a point, thence north 438 feet to a point, thence west 174 feet to a point, thence south 111 feet to a point, thence west 18 feet to a point, thence north 88 feet to a point, thence west 332 feet along the center line of a tank dike to a point, thence north 410 feet to a point, thence west 16 feet to the center of said section 23, thence west 337 feet to a point, thence south 395 feet to a point, thence west 311 feet to a point, thence south 430 feet to a point on Shell's south property line, thence east 648 feet to the point of beginning.

2. Exhibit A attached to the Lease is replaced and superseded by, and clause (b) of article 1 of the Lease shall be deemed to refer to, Exhibit A (Third Revision) which is attached to this Agreement.

3. The antepenultimate sentence of article 1 of the Lease shall be deemed to refer to Shell's drawings GD-1777-10 (dated 4/8/64, revised 9/9/66), and CD-13-36-5 (dated 2/4/64, revised 7/19/66) which are attached to this Agreement and supersede both Drawings GD-1777-8 and CD-13-36-1.

4. Article 3 of the Lease is amended to read and provide as follows:

3. TERM. The term of this Lease shall be eleven (11) years and eleven (11) months, beginning December 1, 1959, and ending October 31, 1971; provided that: (a) if at any time any Lessee no longer desires to have aviation fuels purchased from Shell stored and handled on the Premises and moved through the Pipe Lines, such Lessee may terminate this Lease with respect to such Lessee alone, by giving at least thirty (30) days' prior notice to Shell; except that this termination privilege may not be exercised by United Air Lines, Inc., effective prior to December 31, 1970, or by American Airlines, Inc., effective prior to October 31, 1971, and (b) if at any time any Lessee fails, for any cause reasonably within its control and for at least two successive calendar months, to have any of the aviation fuels purchased from Shell either stored or handled on the Premises or moved through the Pipe Lines, Shell may terminate this Lease with respect to such Lessee alone, forthwith by notice to such Lessee. No termination of this Lease shall relieve any or all of Lessees of any obligation to Shell which has accrued hereunder prior to the effective date of such termination, nor shall any termination with respect to any Lessee alone, affect in any way the continuance of this Lease in full force and effect as to the other Lessees.

5. Article 4 of the Lease is amended to read and provide as follows:

4. RENT. As a several and not joint obligation, each Lessee shall pay to Shell, as rent for each calendar month during the continuance of this Lease as to such Lessee, 0.07 cent per gallon for each gallon of aviation turbine fuel delivered to any pipeline or other transportation facility for delivery to the Premises by or for the account of such Lessee. Rent for each month shall be invoiced to each Lessee at such address as such

Lessee may designate by notice to Shell and shall be payable within 15 days after receipt of such invoice to Shell Oil Company, P.O. Box 756, Church Street Station, New York, New York 10008 or at such other place as Shell may designate by notice to each Lessee.

6. The Lease, as heretofor and hereby amended, is confirmed and continued.

SHELL OIL COMPANY
By E. D. MAXFIELD

AMERICAN AIRLINES, INC.
By H. J. TILLIMAN

UNITED AIR LINES, INC.
By CURTIS BARKES
Executive Vice President—
Finance and Property

## EXHIBIT A (THIRD REVISION)

**To Lease dated December 1, 1959, between Shell Oil Company and American Airlines, Inc. Capital Airlines, Inc. and United Air Lines, Inc.**

**Buildings, Tanks, Piping and Other Facilities Located on the Land described in Article 1 of the Lease.**

*Buildings*

1—12′ x 18′ Insulated Butler type building on a slab foundation with water, sewage, electrical and heating facilities.

*Tanks*

Welded steel constructed in accordance with API specifications 650—Appendix "D".

2—120,000 barrel Cone Roof Tank 124′ Dia. x 56′ ht. (Tanks DP-73 and DP-75).

2—112,000 barrel Floating Roof Tank 120′ Dia. x 56′ ht. (Tanks DP-70 and DP-74).

2—2,000 barrel Cone Roof Tank 20′ Dia. x 36′ ht. (Tanks DP-90 and DP-91).

Above tankage equipped with standard appurtenances including swing lines, automatic gauges, mid-point thermometers, drains, stairways and necessary tank connections and valves.

*Filtration Facility*

7—6 inch Dorr-Clone #2400 Filters
5—Commercial Filter Corporation
Model 42M36 Clay Filters
2—Bendix "Go-No-Go" Filters
Model 20-500 GPM
#0435005-(#720)
1—1,000 gallon Sump Tank
1—Tuthell Sump Pump

1—4 inch x 6 inch x 10½ CAM Bingham Pump 125 H.P. Motor 2 phase, 60 cycle, 440 volts 3600 RPM TEFC CL-1 Group D
Explosion Proof Westinghouse Motor Frame 607S
1—Separator Box
1—Millipore Micro-Scan (Cat. #XM01-000-00).
Above facility equipped with necessary piping, manifolds and valves.

*Earthwork and Tank Foundations*

Earthen dikes of sufficient size to hold 110% of tank capacities.

One (1) 12-foot wide gravel road across terminal property to manifold and office area, including access ramps to all tanks. One (1) 12-foot wide gravel road from gate at NE corner of leased area to Tank DP-74 and DP-75 approximately 1100′ in length including ramp. Concrete ring wall type foundations under the four (4) largest tanks and gravel mat type foundations under the two (2) smaller tanks.

*Terminal Receiving Piping*

Terminal receiving piping consisting of 12-inch diameter receiving manifold, valves and operators, gravitometer and pump, sump pump, 6-inch diameter secondary manifold and valves, individual tank fill lines, and electric power and controls for above pumps and valve operators.

*Slop Pump and Piping*

One (1) 20 HP slop loading, blending, or transfer pump with necessary manifold, valves and tank connections, including 4-inch diameter line to truck bottom loading facilities at the Northeast corner of terminal property.

*Delivery Piping*

Delivery piping consisting of 6-inch diameter tank suction piping from product tanks to individual products

pumps and manifolds, pump discharge piping and controls to two 6-inch diameter lines to O'Hare Air Field and 6-inch diameter transfer line to secondary manifold.

*Product Delivery Pumps*

1—100 HP 600 GPM Vertical A/C Pump and Motor.
2—40 HP 475 GPM Vertical A/C Pump and Motor.

*Electrical*

All necessary transformers, switch gear, distributor and control circuits, including two (2) yard flood lights.

*Fire Extinguishing Equipment*

3—25-pound CO-2 hand fire extinguishers.

**The Pipe Lines Referred to in Article 1 of the Lease**

*Twelve-inch Receiving Lateral from West Shore Meter Station*

One (1) 12-inch diameter pipeline from Badger Pipe Line Meter Station to terminal receiving manifold approximately 2400 feet in length, including required valves and insulating assemblies.

*Sixteen-inch Receiving Lateral from West Shore Meter Station*

One (1) 16-inch diameter pipe line from West Shore Pipe Line Meter Station to terminal receiving manifold approximately 2400 feet in length, including required valves and insulating assemblies.

*Two 6-inch Delivery Lines to O'Hare Air Field*

Two (2) parallel 6-inch diameter pipelines from terminal shipping manifolds and pumps to O'Hare Field airline storage area approximately 15,500 feet in length, including required regulation valves, filter separators, manifold tie-ins, manifold valves, controls, hay tanks, spheroid receiving barrel, meters and registers.

June 2, 1967

Shell Oil Company
450 North Meridian Street
Indianapolis, Indiana 46204

Attention: Mr. W. D. Turner

Gentlemen:

Re: *UAL Contract No. 11267*

This letter will evidence United Air Lines' consent, as required by Section 1 of the subject contract, to the partial use by Shell Oil Company of one of the two 6 inch parallel pipelines which run between the Des Plaines facility and the O'Hare Terminal, such use to be under the terms and conditions set forth in Mr. Turner's letter of May 27, 1967 only.

This consent is conditioned on the understanding that such use by Shell shall, as provided in the lease, be subordinate to the Lessee's prior right to operate and use the Pipe Lines at such times and for such periods as the Lessees' respective businesses may reasonably require, and on the understanding that Shell pay its proportionate share for use of the facility.

Very truly yours,

UNITED AIR LINES, INC.
By CURTIS BARKES
Title: Executive Vice President—
Finance and Property

January 23, 1968

Mayer, Friedlich, Spiess, Tierney,
Brown & Platt
231 S. LaSalle Street
Chicago, Illinois 60604

Gentlemen:

*Attention: Mr. Mark H. Berens*
Re: United Air Lines v. Jones, et al, 63 C 17049

This is in response to your letter of December 22, 1967.

In a 1958 decision in the case of Consolidated Freightways v. Department of Revenue, 54 S 1659, the Superior Court of Cook County indicated that an interstate carrier should be entitled to a motor fuel tax refund with respect to motor fuel purchased in this State but used on the highways of Wisconsin and with respect to which Wisconsin MFT was paid.

Subsequent thereto, in 1959, Section 13 of the Motor Fuel Tax Law was amended by deleting the words "of this State" after the words "public highways" in the first sentence of that section; and was at that time further amended to read: "No refund shall be claimed by or allowed to any person on account of tax paid on motor fuel bought in this State and taken out of this State in the ordinary fuel tank of a motor vehicle." Section 2 of the Act retains the limitation "of this State", however.

We trust that this is the information which you seek.

Sincerely,
Theodore A. Jones
Director
By:
Eugene F. Corrigan, Supervisor
Rules & Regulations Division
Chicago Office
Phone: 316-2000, Ext. 441

EFC:MM

E COPY

No.

JAN 8 1972

E. ROBERT SEAVER, CL

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

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UNITED AIR LINES, INC.,
*Appellant,*

*vs.*

GEORGE E. MAHIN, et al.,
*Appellees.*

---

## ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

---

## JURISDICTIONAL STATEMENT

---


H. TEMPLETON BROWN
MARK H. BERENS
ROBERT L. STERN
WILLIAM E. DOYLE
WILLIAM BRUCE HOFF, JR.
231 South LaSalle Street
Chicago, Illinois 60604

*Of Counsel*
MAYER, BROWN & PLATT



TWENTIETH CENTURY PRESS, INC., CHICAGO 60604

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

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No.

---

UNITED AIR LINES, INC.,
*Appellant,*

*vs.*

GEORGE E. MAHIN, et al.,
*Appellees.*

---

## ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

---

## JURISDICTIONAL STATEMENT

---

Appellant United Air Lines, Inc. ("United") appeals from the judgment of the Supreme Court of Illinois, entered April 1, 1971, rehearing denied, October 4, 1971, holding that United is subject to Illinois use tax on all fuel loaded aboard its aircraft about to depart from Illinois on interstate and foreign flights. Under the Illinois statute, as construed by the 4 to 3 decision, the tax is on the act of loading the fuel aboard the aircraft. United submits this Statement to show that this Court has jurisdiction of this appeal and that substantial Federal questions are presented.

## OPINIONS BELOW

The opinion of the Supreme Court of Illinois has been reported at 49 Ill.2d 45, 273 N.E.2d 585 (1971), and is reproduced in the attached Appendix at page 5. The unre-

ported opinion of the trial court, the Circuit Court of Cook County, is reproduced at App. 1.

## JURISDICTION

This suit was filed by United in the Circuit Court of Cook County, to enjoin the Illinois Department of Revenue from collecting Illinois use tax on all fuel loaded aboard United's interstate and foreign flights just before departure from the Chicago airports. United contended in argument and briefs before the trial court and in the Illinois Supreme Court that the application of Illinois use tax to all fuel so loaded would violate the Commerce Clause, Article I, § 8, cl. 3, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. The Circuit Court of Cook County denied relief, and the Supreme Court of Illinois affirmed by judgment entered on April 1, 1971, stating that the application of the tax in issue did not offend the Commerce Clause. A timely petition for rehearing in the Illinois Supreme Court, asserting the same constitutional issues, was denied on October 4, 1971, and notice of appeal was filed in that Court on December 20, 1971.

The jurisdiction of the Supreme Court of the United States to review by direct appeal the judgment of the Illinois Supreme Court upholding the constitutionality of the State statute is conferred by Title 28, United States Code, Section 1257(2). The following decisions, among others, sustain such jurisdiction: *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450 (1959); *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157 (1954).

## STATUTE INVOLVED

Ill. Rev. Stat., 1961 to 1969, ch. 120, § 439.3:

"A tax is imposed upon the privilege of using in this State tangible personal property purchased at retail

from a retailer. Such tax is at the rate . . . of 4% of the selling price of such property . . . .

• • •

"To prevent actual or likely multistate taxation, the tax herein imposed does not apply to the use of tangible personal property in this State under the following circumstances:

• • •

"(d) the temporary storage, in this State, of tangible personal property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, is used solely outside this State . . . ."

• • •

## CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Art. I, § 8, cl. 3:

"The Congress shall have Power• • •

"[3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes• • •"

United States Constitution, Amend. XIV, § 1:

"• • • [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## QUESTIONS PRESENTED

1. (a) Can Illinois, without creating a direct burden on interstate and foreign commerce in violation of the Commerce Clause, impose use tax on the act of *loading* fuel into aircraft tanks for use on interstate and foreign flights.

(b) Can Illinois, without violating the Commerce Clause, deny United the benefit of a statutory exemption from use

tax for property temporarily stored in Illinois *only because* such storage is with the intention to facilitate United's interstate operations from the O'Hare and Midway airports.

2. Whether the imposition by Illinois of use tax on all fuel loaded aboard United's interstate and foreign flights departing from Chicago constitutes a toll upon interstate commerce in contravention of the fundamental premises of the Commerce Clause—where all of the fuel is purchased outside Illinois, rests in Illinois only for such period as is necessary for United's interstate operations, and except for insignificant amounts is actually consumed outside Illinois.

## STATEMENT OF THE CASE

This suit was brought by United against the Illinois Department of Revenue to enjoin it from collecting Illinois use tax on aviation fuel purchased by and delivered to United outside Illinois, temporarily stored in Illinois by United solely for the needs of its interstate and foreign flights departing from Illinois, loaded on such flights just prior to departure, and nearly all actually consumed outside of Illinois by United's departing aircraft.

### The Illinois Use Tax Act

The Illinois use tax (Ill. Rev. Stat., 1961 to 1969, ch. 120, §§ 439.1 *et seq.*) is a privilege tax* imposed at a rate of 4% on the use in Illinois of tangible personal property purchased at retail. Although "use" is defined (*id.*, § 439.2) to mean ". . . the exercise . . . of any right or power over tangible personal property incident to the ownership of that property . . .", the statute contains an exemption for property purchased outside of Illinois, temporarily stored

* See *Turner* v. *Wright*, 11 Ill.2d 161, 164-65, 142 N.E.2d 84, 86-87 (1957).

in the State, and used solely outside Illinois (*id.*, § 439.3 (6th unnumbered paragraph)). The statute specifically states that this exemption is "to prevent actual or likely multistate taxation" (*ibid.*).

From 1955, when the Illinois use tax was enacted, until 1963, the temporary storage exemption was consistently construed by the Illinois Department of Revenue to cover fuel purchased outside Illinois by common carriers and temporarily stored by them in the State, so that only that portion of the fuel loaded aboard departing flights (or surface vehicles) that was burned in Illinois was subject to use tax. This was known as the "burn-off" rule. In 1963, without any change of statute and not based on any court decision, the Department repudiated the burn-off rule by a Bulletin which provided in part:

> ". . . that temporary storage ends and a taxable use occurs when the fuel is taken out of storage facilities and is placed into the tank of the airplane, railroad engine or truck. At this point, *the fuel is converted into its ultimate use*, and, therefore, a taxable use occurs in Illinois.
>
> "If a common carrier does not have separate facilities for transferring the fuel out of the State of Illinois but always puts it into the tank of the airplane, railroad engine or truck for final consumption, . . . they no longer will be able to give a certificate . . . stating that the fuel is purchased within the temporary storage provisions of the Use Tax Act, but must pay the use tax. . . . " (Emphasis added.)

United's Complaint contended, *inter alia*, that the imposition of the tax on the placing or loading of the fuel into the tanks of aircraft (and vehicles of surface common carriers) departing on interstate and foreign journeys would create a direct burden on interstate commerce in violation of the Commerce Clause, and that such tax would also vio-

late the Due Process and Equal Protection Clauses of the Fourteenth Amendment. In the alternative United acknowledged that the portion of the Illinois-laden fuel actually consumed within the State by the departing aircraft constitutionally might be subjected to Illinois use tax.

### Facts

There is no controversy as to the facts adduced at trial.

All of the aviation fuel involved in this case is purchased from the Shell Oil Co. and delivered to United in Indiana. The purchase is subject to Indiana gross income tax, currently at a rate of ½% of the purchase price.* The fuel is transported by common carriers to O'Hare and Midway airports in Chicago, where it is stored only for such period as is necessary for purification and United's operational needs. All of it is pumped into aircraft fuel tanks, almost always immediately prior to departures by flights in interstate or foreign commerce.**

United's flight operations are governed by Federal Aviation Agency ("FAA") procedures. This includes assigned departure routes from Illinois. As a consequence of knowing the exact distance flown over these FAA routes, United knows the precise amount of fuel each of its departing flights burns from the moment the engines are started until the plane crosses the Illinois border.

The record shows that every United flight lands at Chicago with from 1.7 to 7.0 times the fuel actually used by the aircraft in departing from Illinois. These very large

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* Burns Ind. Stat. Ann. tit. 64, ch. 26, §§ 64-2601 to 64-2603. Pursuant to the contract with Shell, United is obligated to pay this tax, which amounted to approximately $403,000 for the period between July 1, 1963 and December 31, 1967, and $150,000 for 1968. The Indiana tax continues to be imposed on such purchases.

** No intrastate flights are involved in this litigation.

amounts of inbound fuel are extremely chilled because of the low temperatures encountered in high altitude flights, with the result that much of it stratifies at the bottom of the tanks below the warmer fuel loaded at Chicago, and is the first fuel pumped to the engines on the outgoing interstate flights. Because of this stratification of the large amounts of inbound fuel, coupled with short mileage over Illinois on east-, north- and northwest-bound departures from Chicago, approximately 96.3% of all United's departures from Illinois burn no or *de minimis* amounts of Illinois-laden fuel. Of the remaining 3.7%, only a small portion of the fuel loaded at Chicago is actually burned over Illinois.

Very large amounts of the fuel loaded in Illinois are required by FAA safety Regulations to be on board when the flight lands at its destination in another state.* Such fuel cannot and will not be burned in Illinois nor even outside Illinois by the departing flight. It actually is used by United on other flights that occur after the plane has landed in another state and has commenced another interstate flight, as from Milwaukee to Los Angeles.** Many of these flights do not occur on the same day the plane departed from Chicago.

Chicago is the hub of United's nationwide route system. Of this system, authorized by Certificates of Public Convenience and Necessity issued by the Civil Aeronautics Board, only 1.5% of the route miles are in Illinois. In contrast, 13% of all United's flights depart from Chicago and 16.5% of all of the fuel used by United is loaded in Chicago. Of

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* For example, the *minimum* FAA reserve for a DC-8 is 8,000 pounds, which is substantially increased upon threat of adverse weather en route or at destination.

** The FAA fuel reserve requirements are carefully adhered to by airlines. A survey in the record of over 13,500 United flights in 1967 disclosed that 100% of them landed with the FAA required fuel reserves.

the flights touching down at Chicago, 73% average only 45 minutes on the ground, and another 18% average an hour and 52 minutes in Chicago.

Of the passengers enplaned throughout United's system, only about 5.4% (all interstate passengers) initiate their flights in Chicago, but 28.5% are part of Chicago traffic. About two out of three of United's Chicago passengers are through passengers.

Thus, because of its geographic location, Chicago is a conduit for a substantial volume of interstate through traffic that both begins and ends outside Illinois. The Chicago airports' role in this continuous interstate movement is to enable passengers to transfer from one flight to another, on the same line or between lines, and to load fuel and supplies aboard the aircraft while it is on the ground no longer than is necessary to have these functions performed.

## The Decision Below

By a 4 to 3 vote, the Illinois Supreme Court upheld the position of the Department of Revenue's Bulletin that the fuel was "converted into its ultimate use" when it was loaded into the tanks of the aircraft, and held that a tax was due on all the fuel loaded aboard United's interstate and foreign flights.

The *per curiam* opinion, in which only two justices fully concurred, states explicitly that if the fuel were taken from the State "by some means other than placing it in equipment which would consume it" (App. 8), the temporary storage exemption would extend not merely to stationary storage on the ground, but also to the withdrawal of the property from such storage, to its loading aboard transportation vehicles such as tank trucks or railroad tank cars, and to its transportation from the State.

(App. 14-15.) The rationale for this conclusion is that unless the means of removing the property from the State is included within the scope of the exemption, the exemption would be a nullity. As a result of this distinction between the fuel tanks of aircraft (or other vehicles) and other types of facilities for transporting fuel, the *per curiam* opinion necessarily makes the act of loading the fuel into the fuel tanks of the aircraft as the taxable event. Thus, under the *per curiam* opinion, the tax is imposed on the actual loading of the aircraft which commits the fuel to use in interstate commerce.

The *per curiam* opinion supplements this analysis by the statement that United was not entitled to the temporary exemption because (App. 15):

> "... United does not store in Illinois with any intention that the fuel will be used solely outside this State.* Rather, the fuel is *stored here only to facilitate United's [interstate] operations from the O'Hare and Midway airports within the State.* Under the circumstances, the 'storage' becomes something more than a 'temporary storage' for safekeeping prior to its use solely outside of Illinois." (Emphasis and footnote added.)

The opinion concludes that United is not entitled to the statutory exemption (an issue not before this Court), and that the resultant application of the tax to all the fuel loaded aboard interstate flights does not violate the Commerce Clause.

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* The opinion does not question the fact that United knew, and therefore presumably intended, that very little of the fuel loaded in Chicago would be consumed in or over Illinois—specifically, of fuel loaded in Illinois, no or *de minimis* amounts are consumed in the State on about 96% of United's interstate departures and very little on the remaining 4% of flights.

The *per curiam* opinion reached the result it did on the basis of two preliminary conclusions: (i) that the imposition of the tax according to the "burn-off" rule, by which only Illinois-laden fuel actually burned in Illinois is subject to use tax, was prohibited as a burden on interstate commerce by this Court's decision in *Helson and Randolph* v. *Kentucky*, 279 U.S. 245 (1929), and (ii) that *Edelman* v. *Boeing Air Transport*, 289 U.S. 249 (1933), and other authorities permit the taxation of all fuel loaded in Illinois even though it is consumed by interstate flights. This pair of conclusions produces the anomalous result that a tax on *all* of the fuel loaded is deemed less of a burden on interstate commerce than a tax on only the *portion* of such Illinois-laden fuel actually consumed in the State.

Although United strenuously asserted the fact that the fuel in question was being subjected both to Indiana gross income tax and Illinois use tax, the *per curiam* opinion does not allude to the question of multiple state taxation in its Commerce Clause analysis.

In a separate short statement, the two concurring justices expressed uncertainty as to whether the burn-off rule was "constitutionally impermissible," but found it unnecessary to answer that question. They affirmed on the basis of "the plain meaning of the statutory language," and agreed (App. 16) with the *per curiam* opinion that:

> "Illinois may constitutionally collect the tax imposed in this case on all of the fuel loaded on United's planes at the airports."

Justices Kluczynski, Schaefer and Davis dissented, disagreeing with the conclusion that the burn-off rule was barred by the *Helson* case (as well as with the majority's construction of the Illinois statute).

## THE QUESTIONS PRESENTED ARE SUBSTANTIAL

### I. The Judgment of the Illinois Supreme Court Imposing a Use Tax on All Fuel Loaded by United Aboard Its Interstate and Foreign Flights Departing from Illinois Violates the Commerce Clause and is Inconsistent with Controlling Decisions of this Court.

#### A. The Application of the Illinois Use Tax to the Act of Loading Fuel Aboard Aircraft About to Depart from Illinois on Interstate and Foreign Flights Constitutes an Unconstitutional Burden on Interstate Commerce.

The Illinois use tax, as authoritatively construed by the Illinois Supreme Court, is imposed upon the act of loading fuel into United's planes immediately prior to the commencement of their interstate and foreign journeys from Illinois.* That there is no other taxable event is evident both from the scope of the Illinois temporary storage exemption and from the reasoning of the Illinois Court. The taxable event cannot be the withdrawal of the fuel from temporary storage because, according to the Illinois Court's reasoning, what occurs after such withdrawal is decisive as to whether the tax is imposed. If, for example, after withdrawal the goods are transported from Chicago to Milwaukee in a tank truck for use at the Milwaukee airport, no tax is due (App. 15). Contrawise, the Illinois Court interprets *Helson* to prohibit Illinois from taxing the actual consumption of the fuel by the interstate flights. (App. 9-10.) It follows that, under the Illinois Court's decision, the taxable event is, and can only be, the act of loading it aboard United's aircraft in Illinois preparatory to their interstate

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* See earlier discussion at pp. 8-9 *supra*.

journeys.* Because the loading of the fuel onto the aircraft is the taxable event, the State has attempted to tax an integral and inseparable component of the interstate transportation process in direct violation of numerous decisions of this Court.

The leading case of this Court, which the Illinois Court incorrectly failed to follow, is *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157 (1954). There Texas claimed that the transfer of gas from the refinery pipeline to an interstate line was sufficient to trigger a severance tax at the moment the fuel passed from one line to the other. This Court held the interpretation given the statute by the State would result in a direct tax upon interstate commerce, stating in part, 347 U.S. at 166:

> "... It is now well settled that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it."**

This Court emphasized that all local activities had been completed prior to occurrence of the alleged taxable event, and concluded, 347 U.S. at 169:

> "... we think that, as a basis for finding a separate local activity, the incidence must be a more substantial

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* United acknowledged that, under the decisions of this Court, a use tax could be imposed upon the withdrawal of fuel from storage even if some of that fuel is subsequently used to propel vehicles in interstate commerce. See, e.g., *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U.S. 249 (1933); *Edelman* v. *Boeing Air Transport*, 289 U.S. 249 (1933). As shall be discussed at pp. 14-15, *infra*, this authority is inapplicable because of the structure of the Illinois statutory system which does not tax storage or withdrawal from storage, unlike the taxes in those two cases which were on those events.

** Accord, *Railway Express Agency* v. *Virginia*, 347 U.S. 359, 367-68 (1954); *Texas Gas Transmission Corp.* v. *Benson*, 444 S.W. 2d 137 (Tenn. 1969).

economic factor than the movement of the gas from a local outlet of one owner into the connecting interstate pipeline of another."

Similarly, in *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U.S. 90, 92-94 (1937), and *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 427, 433-34 (1947), this Court held that a State could not impose a gross receipts tax upon the loading or unloading of interstate vessels because those activities were so integrally related to interstate commerce that no separate local taxable event could be identified.*

In *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69 (1946), which raised essentially the same point in the context of the Import-Export Clause (Article I, § 10, cl. 2), this Court held that an attempt by the State of California to impose a sales tax at the moment title to fuel oil passed as it was delivered into a ship for carriage to a foreign destination was invalid because "[t]he incident which gave rise to the accrual of the tax was a step in the export process." (329 U.S. at 84.)

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* See, in addition, *Bingaman* v. *Golden Eagle Western Lines*, 297 U.S. 626, 629 (1935); *McCarroll* v. *Dixie Greyhound Lines, Inc.*, 309 U.S. 176, 180 (1939); *Mid-Continent Air Express Corp.* v. *Lujan*, 47 F.2d 266, 267-68 (D.N.M. 1931); *Nippert* v. *Richmond*, 327 U.S. 416, 423-26 (1946); *Carson Petroleum Co.* v. *Vial*, 279 U.S. 95, 101 (1929); *Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232, 275-78 (1872); *Norris* v. *City of Boston*, 48 U.S. (7 How.) 283, 464 (1849). Cf. *Northwest Airlines* v. *Joint City-County Airport Bd.*, 463 P.2d 470 (Mont. 1970) (invalidating airport head taxes upon enplaning interstate passengers); *Evansville-Vanderburgh Airport Authority Dist.* v. *Delta Airlines*, 265 N.E.2d 27 (Ind. 1970), *cert. granted*, 92 S.Ct. 43 (No. 70-99) (same); *Allegheny Airlines* v. *Sills*, 264 A.2d 268 (N.J. Super. 1970). But cf. *Northeast Airlines* v. *New Hampshire Aeronautics Comm'n*, 273 A.2d 676 (N.H. 1971), *prob. juris. noted*, 92 S.Ct. 60 (No. 70-212).

Just as in *Michigan-Wisconsin Pipe Line* and in the other cases cited, the incidence of the use tax in the instant case falls upon an activity—the loading of fuel into aircraft tanks for use in interstate flights—which is an integral part of interstate commerce and does not, under any persuasive theory, represent a separable local activity upon which the State may legitimately exercise its taxation powers. As this Court stated in *Joseph* v. *Carter & Weekes Co.*, 330 U.S. at 427-28:

> "The transportation in commerce, *at the least*, begins with loading and ends with unloading. Loading and unloading has effect on transportation outside the taxing state because those activities are not only preliminary to but are an essential part of the safety and convenience of the transportation itself." (Emphasis added.)

The earlier decisions in *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U.S. 249 (1933); *Edelman* v. *Boeing Air Transport*, 289 U.S. 249 (1933); and *American Airlines, Inc.* v. *Wallace*, 57 F.2d 877 (M.D. Tenn., 1932), *aff'd*, 287 U.S. 565 (1932), do not conflict with the foregoing cases. In fact, the reasoning of this Court in the *Nashville* case adds considerable support to United's position.

All three cases involved a state tax, the legal incidence of which was explicitly on the storage of fuel or on its withdrawal from storage or both. In each situation the tax was due on or before withdrawal without regard to whether the fuel was loaded into a tank truck or an airplane. These cases, therefore, are fundamentally different from the instant case, where the incidence of the use tax cannot be determined until it is ascertained into what the fuel is loaded, hence making the loading the taxable event. This difference was clearly spelled out in *Nashville C. & St. L. Ry.* v. *Wallace*, 288 U.S. at 268:

> ". . . Hence, there can be no valid objection to the taxation of the exercise of any right or power incident to

appellant's ownership of the gasoline, which falls short of a tax directly imposed on its use in interstate commerce, deemed forbidden in *Helson* v. *Kentucky, supra.* Here the *tax is imposed on* the successive exercise of two of those powers, *the storage and withdrawal from storage* of the gasoline. *Both powers are completely exercised before use of the gasoline in interstate commerce begins.* The tax imposed upon their exercise is therefore not one imposed on the use of the gasoline as an instrument of commerce and the burden of it is too indirect and remote from the function of interstate commerce itself to transgress constitutional limitations." (Emphasis added.)

The foregoing passage was quoted with approval in *Edelman* v. *Boeing Air Transport,* 289 U.S. at 252, with the determination "... that the statute as applied [in *Edelman*] is identical in operation with that sustained in *Nashville....*"

**B. The Illinois Use Tax Unconstitutionally Burdens Interstate Commerce If It Is Based Upon the Mere Intention of United to Use the Fuel Temporarily Stored in Chicago to Facilitate Interstate Commerce.**

The *per curiam* opinion of the Illinois Supreme Court declares that the foregoing authority is inapplicable because, under the plain language of the statute, exempt temporary storage must be for use "solely outside this State." (App. 14.) It goes on to say (App. 15) that:

"... United does not store in Illinois with any intention that the fuel will be used solely outside this State. Rather, the fuel is *stored here only to facilitate United's* [*interstate*] *operations from the O'Hare and Midway airports within the State.* Under the circumstances, the 'storage' becomes something more than a 'temporary storage' for safekeeping prior to its use solely outside of Illinois." (Emphasis added.)

If this passage is to be taken literally, the Illinois Court has concluded that United's act of storing the fuel in Chicago to facilitate its interstate flights from the Chicago airports rendered the temporary storage exemption unavailable to United.*

This extraordinary reasoning would make all the fuel temporarily stored in Illinois by United subject to the use tax because—and only because—it is held for interstate flights departing from Chicago. Such a holding by the Illinois Court likewise would cause the use tax to constitute a direct, unconstitutional burden upon an integral aspect of interstate commerce by virtue of the same decisions of this Court discussed in Part 1A of this Jurisdictional Statement (pp. 11-15, *supra.*)

The Illinois Court has in effect *conditioned* the availability of the temporary storage exemption to common carriers on the fuel *not* being used by them to facilitate the operation of interstate flights departing from Illinois. Ever since *Western Union Telegraph Co.* v. *Kansas*, 216 U.S. 1, 30-37 (1910), holding that Kansas could not impose a capital stock fee computed on the *total* authorized capital of Western Union as a condition to conducting local business in Kansas, such a condition upon commerce has been clearly unconstitutional. See, *e.g.*, *Quaker City Cab Co.* v. *Pennsylvania*, 277 U.S. 389 (1928) (State cannot impose upon a foreign taxicab company, as a condition of doing business locally, a tax that is invalid under the Equal Protection Clause); *Frost & Frost Trucking Co.* v. *Railroad Commission*, 271 U.S. 583 (1926) (State cannot constitutionally affix to the privilege of using highways the condition that a carrier assume all the burdens and duties of a common carrier); *Terral* v. *Burke Const. Co.*, 257 U.S.

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* As mentioned previously, there are no intrastate flights involved in this litigation.

529 (1922) (State law invalid which requires foreign corporation, as a condition of continuing to do business, to refrain from resorting to Federal courts).

### C. The Illinois Supreme Court Has Misconstrued Controlling Authorities of this Court in Holding that, under the Commerce Clause, Illinois Can Tax All of the Fuel Loaded Aboard Interstate Flights Departing Illinois, but Cannot Tax that Portion of such Fuel that is Actually Consumed in Illinois.

As has been previously shown (pp. 14-15, *supra*), the Illinois Court has incorrectly applied *Edelman* v. *Boeing Air Transport*, 289 U.S. 249 (1933), and other authorities of this Court to conclude that Illinois may apply its existing Use Tax Act so as to tax all fuel loaded by United on its interstate flights leaving Chicago. The four-justice majority of the Illinois court failed to recognize the essential difference that the taxes involved in the other cases were imposed prior to the loading. This wrongful conclusion was coupled by a misconstruction of *Helson and Randolph* v. *Kentucky*, 279 U.S. 245 (1929), by two of the majority justices in their conclusion that that decision rendered the burn-off rule unconstitutional. This reasoning produces the remarkable result that the taxation of all the fuel loaded into United's planes at Chicago is deemed less of a burden on interstate commerce than merely taxing that portion which is actually consumed in Illinois.

*Helson* involved a Kentucky gasoline tax which was imposed upon the use of fuel within the State. There the interstate carrier purchased fuel in Illinois, which was brought into Kentucky in the fuel tanks of a river ferry. The only contact that fuel had with Kentucky was that it supplied the propulsive power for the interstate ferry across the Ohio River. The fuel was neither stored nor withdrawn from storage in Kentucky. Thus, the only possible incidence

of the Kentucky tax was upon the consumption of the fuel in interstate commerce. Such a tax unquestionably was a direct, unconstitutional burden upon such commerce.*

The principle established by *Helson* is not applicable to the instant situation. Under the Illinois Use Tax Act, fuel brought into the State for storage or for any other purpose becomes taxable (as soon as it comes to rest) because there has been an exercise in Illinois of a right or power over the property incident to its ownership (Ill. Rev. Stat., 1961 to 1969, ch. 120, § 439.2), unless such "use" falls within an exemption such as that for temporary storage. The portion of the fuel shipped into Illinois by United for storage at Chicago and then consumption in Illinois, by interstate flights or otherwise, is subject to use tax from the moment it comes to rest in the State. It is at that time the use tax becomes due on that portion of the fuel. This is the true rationale of the burn-off rule. It is a distortion to characterize the burn-off rule as a direct tax on the consumption of fuel in interstate commerce, as is prohibited by *Helson*.

Even if the amount of fuel consumed by United on its departing interstate flights is the measure of the Illinois use tax, it is well-established that, where there is a suitable local event upon which to base tax, it may be *measured by that part of interstate activities that occur within the state.* This includes fuel consumption within a state by vehicles moving in interstate commerce. See *McCarroll* v. *Dixie Greyhound Lines*, 309 U.S. 176, 178-79 (1940). See, in addition, *Thompson* v. *Continental Southern Lines*, 222 Ark. 108, 257 S.W.2d 375, 377 (1953); *Larey* v. *Continental Southern Lines*, 243 Ark. 278, 419 S.W.2d 610, 614 (1967); *Department of Revenue* v. *Greyhound Corp.*, 321 S.W.2d 60, 61 (Ky. 1959); *Lake Shore Coach Lines* v. *Alger*, 327 Mich. 146, 41 N.W.2d

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* The fuel in *Helson* is analagous to the fuel brought into Illinois by United's planes, which Illinois is not seeking to tax.

503, 508 (1950); *Mason & Dixon Lines* v. *Commonwealth*, 185 Va. 877, 41 S.E.2d 16, 19-20 (1947), *cert. denied*, 331 U.S. 807 (1947).*

In the leading case of *McCarroll* v. *Dixie Greyhound Lines, supra*, this Court held that highway carriers engaged in interstate journeys may constitutionally be required to pay a state privilege and excise tax measured by the number of gallons of fuel burned within the taxing state by the carriers' vehicles using the state's highways (309 U.S. at 178-79). Significantly, this case held that the carriers could not be required to pay a tax upon fuel carried in their vehicles' tanks that would be consumed in other states (309 U.S. at 180).

Based on the foregoing authority, Illinois may have sufficient contacts with that portion of the fuel stored *and burned* in the State to permit Illinois to tax it without offending the Commerce Clause as interpreted by *Helson*. However, for the reasons stated in Parts I A, B and D and II of this Jurisdictional Statement, Illinois is constitutionally prohibited from imposing an unapportioned privilege tax on the loading of the fuel in Illinois. Accordingly, if this

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* In various other circumstances in which a local aspect of interstate commerce was properly subject to state taxation, the courts have sustained a tax measured by the activities carried on within the taxing jurisdiction. See, *e.g.*, *Alaska* v. *Arctic Maid*, 366 U.S. 199, 203-05 (1961) (occupation tax on freezer ships measured by value of fish obtained for processing); *Asiatic Trans-Pacific* v. *Maddox*, 371 F.2d 132, 134-35 (9th Cir. 1967) (where services as agent for van and storage companies were performed in Guam, privilege tax measured by gross receipts from services was permissible); *Higman Towing Co.* v. *Cocreham*, 70 F.Supp. 628, 635 (E.D. La. 1957), *aff'd*, 165 F.2d 789 (5th Cir. 1948) (sustained income tax on petroleum transportation company measured by number of barrels transported and mileage they were transported within taxing State).

Court concludes that *Helson* precludes application of a burn-off rule under the circumstances of this case, none of the fuel may be taxed.

### D. The Imposition of the Illinois Use Tax on all the Fuel Loaded Aboard Interstate Flights Departing Illinois Constitutes an Unapportioned Privilege Tax on Interstate Activities that Will Result in Multiple State Taxation of Such Activities in Violation of the Commerce Clause.

The Illinois use tax is a privilege tax imposed on the privilege of using tangible personal property. *Turner* v. *Wright*, 11 Ill.2d 161, 164-65, 142 N.E.2d 84, 86-87 (1957). Privilege taxes imposed on interstate activities must, if they are to pass constitutional muster, be apportioned. In *Gwin, White & Prince* v. *Henneford*, 305 U.S. 434, 439 (1939), involving the imposition of a Washington state privilege tax measured by gross receipts (as is the Illinois use tax), this Court invalidated the attempt to impose such tax on the business of marketing fruit which was sold and shipped to various states and foreign countries, stating:

> "Such a [privilege tax measured by gross receipts], at least when not apportioned to the activities carried on within the state [citations omitted], burdens the commerce in the same manner and to the same extent as if the exaction were for the privilege of engaging in interstate commerce and would, if sustained, expose it to multiple tax burdens, each measured by the entire amount of the commerce, to which local commerce is not subject.
>
> "Here the tax, measured by the entire volume of the interstate commerce in which appellant participates, is not apportioned to its activities within the state. If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay

a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, *though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed.*" (Citations omitted and emphasis added.)

See, e.g., *Norton Co.* v. *Department of Revenue*, 340 U.S. 534, 539 (1951) (retailers' occupation tax could not be applied to that portion of gross receipts from orders sent directly from taxing State to head office by customers and shipments were made to customers from head office); *Central Greyhound Lines* v. *Mealey*, 334 U.S. 653, 661-64 (1948) (State may constitutionally tax gross receipts apportioned according to mileage travelled within State but not receipts derived from mileage ouside of State); *Freeman* v. *Hewit*, 329 U.S. 249 (1946) (unapportioned gross income tax upon certain interstate sales of securities constitutionally impermissible); *Hans Rees' Sons* v. *North Carolina*, 283 U.S. 123, 133-36 (1931) (State income tax apportionment formula unconstitutional); *Cudahy Packing Co.* v. *Hinkle*, 278 U.S. 460, 466 (1929) (unapportioned filing fees and license taxes unconstitutional); cf. *Norfolk & Western Ry. Co.* v. *Missouri State Tax Comm'n*, 390 U.S. 317 (1968) (State formula for taxatiton of property unconstitutional). Compare *Railway Express Agency* v. *Virginia*, 347 U.S. 359 (1954) (unapportioned privilege tax for doing business in State unconstitutional) with *Railway Express Agency* v. *Virginia*, 358 U.S. 434 (1959) (apportioned franchise tax measured by gross receipts constitutional). See also *General Motors Corp.* v. *Washington*, 377 U.S. 436 (1964) (privilege tax to do business in State measured by gross receipts constitutionally permissible if fairly apportioned).

It follows that if a privilege tax may be imposed on the fuel used by United on its interstate flights departing Chicago, it must be reasonably apportioned. One basis for such apportionment is according to how much of the fuel is consumed in the state in which it is loaded. The alternative is multiple state taxation of the same fuel, as actually occurs under the Illinois Court's decision. The purchase of the fuel by United is subject to Indiana gross income tax. Illinois in turn would subject all the fuel to Illinois use tax because it is loaded aboard aircraft in Illinois. The result is a classic example of multistate direct taxation of interstate commerce* which this Court uniformly has held repugnant to the Commerce Clause. E.g., *Central Greyhound Lines* v. *Mealey*, 334 U.S. 653, 662-63 (1948); *Adams Mfg. Co.* v. *Storen*, 304 U.S. 307, 311 (1938); *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250, 255-57 (1938); cf. *General Motors Corp.* v. *District of Columbia*, 380 U.S. 553, 559-60 (1965).

## II. The Illinois Use Tax, as Authoritatively Construed by the Illinois Supreme Court to Lay a Privilege Tax upon Fuel under the Circumstances of this Case, Constitutes an Unconstitutional Toll Upon Commerce among the States.

Part I of this Statement has focused on the specific issue whether the act of loading fuel onto aircraft departing on interstate and foreign flights is a sufficient local incident, severable from the interstate transportation, upon which Illinois can properly tax all the fuel so loaded. Underlying that issue is the fundamental question whether Illinois should be able to tax all the jet fuel temporarily stored by United in Illinois only for such period as is necessary to

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* Of course, if a portion of the fuel loaded in Illinois is subject to Illinois use tax, there still will be multiple state taxation, albeit at a reduced rate.

facilitate its interstate and foreign operations from the Chicago airports, particularly in light of the fact that virtually none of the fuel is actually consumed in Illinois.

As was more fully described in the Statement of the Case (pp. 7-8, *supra*), Chicago is the hub of United's nationwide operations. Solely because of its geography, Chicago receives a huge volume of air service from United and other carriers not attributable to Chicago's own traffic. Much of this service is through traffic with no local aspect. For it, Chicago is merely a connecting link in a never-ending series of continuous interstate movements that begin and end outside of Illinois. For example, only 5.4% of the United system's passengers originate at Chicago but 13% of its daily flights depart from there, and 16.5% of its total fuel is loaded there. The Chicago airports' role in this through traffic is merely to enable passengers to transfer from one flight to another, and to load fuel and supplies aboard the aircraft which remains on the ground no longer than is necessary to perform these functions. Almost two-thirds of United's Chicago pasengers are through passengers. Because of Chicago's transit role, United must temporarily store great quantities of aviation fuel each year at Chicago for operational purposes. This fuel comes to rest in Chicago only for such period as is necessary for purification and for the conduct of United's operations.

Of some 250 million gallons of fuel loaded each year by United on some 85,410 interstate flights departing Chicago, only small amounts of Illinois-laden fuel are consumed in Illinois by only about 3.7% of these departures. The remainder of the fuel is actually consumed in and over other states, frequently after one or more intermediate stops.

In effect, therefore, Illinois has sought to establish itself as a toll-taker on interstate commerce to gain undue advantage from the geographical accident which funnels such a high volume of interstate traffic through the Chicago air-

ports. This toll bears no relation—and, indeed, is not designed to bear any relation—to the fuel which is actually consumed in Illinois. Nor does the toll bear any reasonable relation to fair compensation to the State for services rendered. When "the amount of the tax exceed[s] fair compensation to the State," *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542, 544 (1950), the tax in question has consistently been invalidated by this Court. 339 U.S. at 544 & n.3.

It was precisely this sort of potential exploitation of geographic position through the imposition of tolls upon interstate commerce which was deemed to be a major defect in the Articles of Confederation which the Framers of the Federal Constitution sought to eliminate. For example, Alexander Hamilton in the *Federalist* observed the dire consequences for commercial relationships which had resulted in Germany because of the imposition of tolls upon commerce as it passed through each principality:

> "The commerce of the German empire is in continual trammels from the multiplicity of the duties which the several princes and states exact upon the merchandises passing through their territories, by means of which the fine streams and navigable rivers with which Germany is so happily watered are rendered almost useless."

Mr. Justice Story, in his Commentaries on the Constitution, noted that one of the principal reasons for affording Congress the power to regulate commerce among the States was to eliminate the stifling effect upon commerce caused by duties levied by individual States. J. Story, *Commen-*

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" *The Federalist Papers*, No. 22, at 145 (Mentor ed. 1961). See, in addition, *The Federalist Papers*, No. 7, at 62-63 (Hamilton); No. 42, at 267-268 (Madison) (Mentor ed. 1961); *The Writings of James Madison*, Vol. 2, p. 395 (Hunt ed. 1901).

*taries on the Constitution of the United States*, Vol. 1, §§ 259, 260 (4th ed. Cooley 1873).* See, e.g., *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, 438-39, 445-46 (1827).

This Court likewise has frequently recognized that the elimination of tolls upon interstate commerce was a principal objective of the Commerce Clause. As Mr. Justice Grier noted in *Norris* v. *City of Boston*, 48 U.S. (7 How.) 283, 464 (1849), a state may not refuse a right of passage to persons or property through her territory, or . . . *exact a duty for permission to exercise it.*" (Emphasis added.) To the same effect, see *Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232, 275-278 (1872).** More recently, in

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* See generally Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 Yale L. J. 219, 228-233 (1957):

> ". . . One need not go back to the castles on the Rhine and the Loire, to the hazards and burdens of the overland routes to the Far East, in order to measure the power and ascertain the position of the tolltaker on a strategic trade route. Our own preconstitutional history discloses that the ports and the states astride the trade routes exploited their situation to the disadvantage and displeasure of their less strategically situated neighbors, and that recriminations and reprisals resulted. On more than one occasion, *The Federalist* refers to this unhappy situation and holds out the promise that the proposed Constitution will end it."

See also Hartman, *State Taxation of Interstate Commerce: A Survey and an Appraisal*, 46 Va. L. Rev. 1051, 1053 (1960); *Developments in the Law—Federal Limitations on State Taxation of Interstate Business*, 75 Harv. L. Rev. 953, 968-972 (1962).

** See *Northwest Airlines* v. *Joint City-County Airport Bd.*, 463 P.2d 470 (Mont. 1970) (invalidating airport head taxes upon enplaning interstate passengers); *Evansville-Vanderburgh Airport Authority Dist.* v. *Delta Airlines*, 265 N.E.2d 27 (Ind. 1970), *cert. granted*, 92 S.Ct. 43 (No. 70-99); *Allegheny Airlines* v. *Sills*, 264 A.2d 268 (N.J. Super. 1970).

*Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 434 (1947), this Court stated that "[t]he avoidance of . . . a local toll on passage of commerce through a locality was one of the reasons for the adoption of the Commerce Clause." Again, in *Freeman* v. *Hewit*, 329 U.S. 249, 254 (1946), this Court stated, in invalidating the Indiana gross income tax as applied to certain interstate sales, that "the aim of the Commerce Clause was precisely to prevent States from exacting toll from those engaged in national commerce."

Yet to establish a toll upon all fuel passing through the State in interstate commerce, no matter where that fuel subsequently is to be consumed, is precisely what Illinois has sought to accomplish in the instant case. Illinois has created the functional "equivalent to a rampart of customs duties" (*Baldwin* v. *G.A.F. Seelig*, 294 U.S. 511, 527 (1935)) through the imposition of its use tax upon fuel loaded on United interstate flights passing through Chicago, even though almost all of such fuel is actually consumed outside of the State. This "unreasonable clog upon the mobility of commerce" (294 U.S. at 527) is a subtle yet real violation of the fundamental rationale of the Commerce Clause.

The reality of the toll being imposed by Illinois becomes apparent by reference to the safety Regulations of the FAA, which require air carriers such as United to load quantities of fuel which are not to be consumed during the particular flight, but must be on board at destination. Based on an extensive survey by United of its flights, it appears that these reserve quantities are in fact on board at destination 100% of the time. In addition to the FAA required reserves, United imposes upon itself a substantial supplementary reserve which, based on an extensive survey, is on board at destination on 99.6% of all of United's

flights. Inasmuch as the destination of all flights involved in this litigation is in other states, this reserve fuel can only be consumed on subsequent flights between other states.

## CONCLUSION

For the foregoing reasons, substantial questions are presented in this appeal, which affect not only United but all other similarly situated interstate air and surface carriers, and accordingly the instant case merits plenary review by this Court.

Respectfully submitted,

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# APPENDIX

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## OPINION OF TRIAL COURT

This suit was commenced by United Air Lines, Inc. to enjoin the assessment and collection of Illinois Use Tax measured by the amount of fuel owned by United and loaded in Illinois into fuel tanks of its aircrafts to propel them in interstate and foreign commerce.

In arriving at a decision in this case, which as far as I have been able to determine is without precedent in this State, or for that matter in any of the other States, I have been greatly aided by the excellent memorandum of authorities submitted by the attorneys for each of the parties.

The plaintiff contends and the proof establishes that all of this fuel is purchased from Shell Oil Company in the State of Indiana, and is transferred to storage facilities at or near O'Hare and Midway Airports for temporary storage and then loaded into the fuel tanks of the aircraft for use beyond the borders of the State of Illinois. With respect to the fuel designated for use in the planes operating out of O'Hare Field the fuel is transported by pipeline from either Hammond or East Chicago, Indiana, to a storage tank located in DesPlaines, Illinois, which is owned by Shell and leased jointly to United and American Airlines Company. From there it is then transferred by a series of pipelines to O'Hare Field and eventually pumped or placed in plaintiff's aircraft. With respect to Midway, the fuel is transferred by truck and placed in storage and ultimately placed in the planes.

Since the adoption of the Use Tax Act in 1955, until June, 1963, all common carriers were required to pay a tax only on that portion of the fuel actually consumed in the State of Illinois, which concept of liability under that Act has been designated in the trial of this matter as the "Burnoff theory."

On June 3, 1963, the then Director of Revenue, Theodore J. Issacs, ruled the Department's position to be that "tempo-

rary storage ends and taxable use occurs when the fuel is taken out of storage facilities and placed in the tank of the airplane, railroad engine or truck. At this point the fuel is converted into its ultimate use, and therefore a taxable use occurs in Illinois." The announced purpose of the bulletin as stated therein was to "clarify the Department's position concerning the temporary storage provisions of the Use Tax Act and their relationship to fuel consumed by a common carrier."

It is this interpretation of the Use Tax Act which is attacked by the plaintiff.

Plaintiff contends that this interpretation is unauthorized by, and contrary to the Use Tax Act, and is violative of Article 2, Section 2; Article 4, Section 13; and Article 9, Section 1, of the Constitution of the State of Illinois; as well as Article 1, Section 8, Clause 3; Article 1, Section 10, Clause 2, of the Constitutiton of the United States, and the Fourteenth Amendment thereto.

As I understand the position of the plaintiff, it contends that none of the fuel placed in the tank of its planes in Illinois is consumed in Illinois. To support this, plaintiff submits that a regulation of the Civil Aeronautic Board requires that all planes arriving at Midway or O'Hare must carry reserve fuel sufficient to carry them to other airports such as Milwaukee, Detroit, Indianapolis, St. Louis, etc. in case they are not able to land at the local airports. By virtue of flying at an altitude in excess of 30,000 feet this fuel becomes extremely cold and when refueling takes place at local airports, the fuel is much warmer and consequently when injected into the plane rises to the top of the fuel tank. This results, plaintiff contends, in the cold fuel which was in the plane on its arrival, being used first, and which fuel, in all or practically all instances, is more than sufficient to propel the planes out of Illinois.

Plaintiff's evidence that higher temperature of fuel pumped into tanks of its planes upon their arrival in Illinois causes such fuel to flow through and rise above any colder fuel in those tanks corroborates the fact that such natural phenomenon results.

This evidence, however, does not permit this Court to then conclude that therefore none of the fuel pumped in Illinois into those tanks was consumed in propelling plaintiff's planes through the State of Illinois.

Plaintiff then contends that in any event, the Use Tax Act required it to pay that tax only on the amount of fuel consumed in Illinois. The law, however, is otherwise. The Supreme Court of this State has consistently stated that the tax is imposed on the *privelege* of use, not *on the extent of the use* of the privilege. It matters not how much of the fuel is consumed in Illinois. (Bode v. Barrett, 412 Ill. 204; Turner v. Wright, 11 Ill. 2d 161; Hicklin v. Coney, 290 U.S. 169.)

Further it appears from the statute and the law that the definition of "use" extends beyond actual "consumption" of tangible personal property. The statute defines use as follows: "Use means the exercise by any person of any right or power over tangible personal property incident to the ownership of that property." (Ch. 120, Par. 439.2, Ill. Rev. Stat.)

Unquestioned here is the fact that plaintiff owns the fuel that it causes to be stored in the storage tanks in Illinois, from which tanks it further causes such fuel to be withdrawn, then conveyed to the planes, and then pumped into the fuel tanks of those planes in Illinois.

Those facts clearly disclose that plaintiff does "exercise a right or power over tangible personal property (the fuel) incident to the ownership of that property" in Illinois. This

is the exact statutory definition of "use." The tax is properly imposed on the privilege of exercising such dominion. (Turner vs. Wright, 11 Ill. 2d. 161; Miller Brewing Co. vs. Korshak, 35 Ill. 2d 86; Philco Corporation, et al., vs. Department of Revenue, Doc. Nos. 40497, 40582, rehearing denied September 1968, not yet officially reported.)

It seems apparent that the facts in this case invoke tax consequence unless plaintiff is excluded by one of the exemptions in the Act. If plaintiff is excluded, it must be by virtue of Subparagraph (d) of Paragraph 439.33, which is as follows:

> (d) the temporary storage, in this State, of property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, is used solely outside this State or physically attached to or incorporated into other property that is used solely outside this State.

At first impression it appears that this provision might indeed exempt plaintiff from tax consequence on fuel which it proves is consumed solely outside the State of Illinois, even though plaintiff in Illinois exercises dominion over that fuel which constitutes the "use" under the Act invoking tax liability.

However, two reasons emerge why plaintiff is not entitled to this exemption.

First, plaintiff has not met the burden of proof the law requires. As stated previously, I cannot conclude from the evidence that *none* of the fuel placed in the tanks of its planes in Illinois was consumed here. In addition, many of the plaintiff's flights originate in Chicago, and the conclusion must be drawn that most, if not all, of these flights take on the bulk of their fuel here.

Second, in my opinion, the exemption intended to be granted by the Legislature is not available to the plaintiff.

As I read that exemption in the context of the purpose of the Act, and the applicable law, the exemption is restricted to that class of tangible personal property which enters the State of Illinois, temporarily rests here, then leaves to be sold or resold outside the State. The property *itself* must be capable of interstate mercantile transaction after it leaves Illinois. Plaintiff's fuel does not meet this test. Plaintiff itself consumes that fuel.

It is my opinion that the interpretation placed on the Act by the then Director of Revenue is authorized by, and in accord with that Act. Both the Act and the interpretation are proper and valid, and do not violate any of the State or Federal Constitutional provisions as claimed by the plaintiff. I so hold.

• • •

(No. 42042.—Judgment affirmed.)

UNITED AIR LINES, INC., Appellant, *vs.* GEORGE E. MAHIN *et al.*, Appellees.

*Opinion filed April 1, 1971.—Rehearing denied October 4, 1971.*

UNDERWOOD, C.J., *and* GOLDENHERSH, J., specially concurring.

KLUCZYNSKI, SCHAEFER and DAVIS, JJ, dissenting.

APPEAL from the Circuit Court of Cook County; the Hon. THOMAS C. DONOVAN, Judge, presiding.

PER CURIAM: United Air Lines, Inc., brought this action in the circuit court of Cook County to enjoin the Department of Revenue from assessing and collecting Illinois use tax on aviation fuel loaded at Chicago airports on planes of United which are about to embark upon, or to continue upon, interstate and foreign flights. Named as defendants

were appropriate State officials and United's supplier, the latter having the burden of collecting the tax. Judgment was for defendants and United has appealed, being joined by American Airlines, Braniff Airways and Northwest Airlines, to whom we have granted leave to file briefs as *amici curiae*.

The Use Tax Act, which went into effect in August, 1955, (Laws of 1955, p. 2027,) imposes a tax on the privilege of using in this State tangible personal property that was purchased elsewhere, and was designed to complement the Retailers' Occupation Tax Act, (Laws of 1933, p. 924,) under which a tax is imposed upon persons engaged in the business of selling tangible personal property to purchasers for use and consumption. It has been found to be constitutional (*Turner* v. *Wright*, 11 Ill.2d 161), and it is settled that the Use Tax Act was enacted for the valid purposes of preventing evasion of retailers' occupation tax by persons making out-of-state purchases of tangible personal property for use in Illinois, and of protecting Illinois merchants against diversion of business. At issue here, a matter of first impression, is the construction and application of that portion of section 3 of the Act which, from its inception in 1955, has provided for an exemption from the tax in these terms: "To prevent actual or likely multistate taxation, the tax herein imposed shall not apply to the use of tangible personal property in this State under the following circumstances: * * * (d) the temporary storage, in this State, of tangible personal property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, is used solely outside this State * * *." Ill. Rev. Stat. 1955, ch. 120, par. 439.3.

Conforming to a practice which has been essentially the same since May, 1953, United purchases and takes delivery of the aviation fuel in question from Shell Oil Company at

facilities of the latter located in Hammond and East Chicago, Indiana. Thereafter, United transports it by common carrier pipeline and trucks to its underground storage facilities at O'Hare and Midway airports in Illinois. Fuel transported by pipeline is first placed in storage tanks at Des Plaines, Illinois, and from there, as needed, is piped to the underground facilities. It remains in the latter only so long as necessary for certain purification processes, and from there is pumped into the tanks of United's aircraft, almost always immediately prior to departure time. United pays the tax on fuel used in intrastate flights, training flights and the like, and the dispute here relates only to fuel loaded on planes departing on interstate or foreign flights, United having 234 such flights each day. All of the aircraft involved must fly over specific routes prescribed by Federal aviation authorities, and thus the amounts of fuel consumed from the time the engines of the planes are started at the Illinois airports until they pass over Illinois borders can be determined with great accuracy.

From the record it appears that there were, and are, numerous common carriers, such as railroads, airlines and trucklines, which, like United, engaged in the practice of purchasing their fuel outside Illinois and storing it here prior to their use of it to propel equipment setting forth on interstate journeys. Immediately after the enactment of the Use Tax Act in 1955, the Department of Revenue uniformly and consistently interpreted and applied the Act to these carriers in such a manner that the incidence and measure of the tax was taken to be only that portion of the fuel consumed in or over Illinois. This construction has been commonly referred to as the "burn off" rule and, during the period of its application, provoked no amendatory legislation. Eight years later, on June 3, 1963, the Department abruptly changed its interpretation and issued a bulletin which announced:

"The Department's position is that temporary storage ends and a taxable use occurs when the fuel is taken out of storage and placed into the tanks of the airplanes, railroad engine or truck. At this point the fuel is converted into its ultimate use, and, therefore, a taxable use occurs in Illinois.

"If a common carrier does not have separate facilities for transferring the fuel out of the State of Illinois but always puts it into the tank of the airplane, railroad engine or truck for final consumption, then they no longer will be able to give a certificate to the vendor stating that the fuel is purchased within the temporary storage provisions of the Use Tax Act, but must pay the Use Tax to their supplier." In short, under this construction all fuel loaded on United's planes at the two airports was deemed to measure the tax, and the exemption in question was construed as having application only if the temporarily stored fuel is transported out of the state for use elsewhere by some means other than placing it in equipment which would consume it.

The present action, which for reasons not apparent in the record has been slow to progress, as soon initiated by United to enjoin the collection of the tax. In substance, it was the position of United that the new construction was erroneous and unreasonable, that the application of the Act as proposed contravenes the Illinois and Federal constitutions, and that it has no use tax liability incident to the fuel in controversy, or, alternatively, that it is liable only for tax measured by the amount of fuel burned in and over Illinois. The trial court rejected these contentions and United has renewed them here.

To support its contention that the "burn off" construction indulged in by the Department for 8 years should continue to prevail, United relies principally upon the rule of statutory construction that courts, in determining the proper construction of an ambiguous statute, will consider

and give weight to the contemporaneous construction placed upon a statute by the governmental officers or departments charged with the duty of administering it, and will usually adopt such contemporaneous construction where it is a reasonably permissible construction, has the implied assent of the legislature, and has been consistent, uniform and long continued. See: *People ex rel. Spiegel* v. *Lyons,* 1 Ill.2d 409; *Illinois Bell Telephone Co.* v. *Illinois Commerce Com.,* 414 Ill. 275; *United States* v. *Leslie Salt Co.,* 350 U.S. 383, 100 L. Ed. 441, 76 S. Ct. 416; *Cory Corp.* v. *Sauber,* 363 U.S. 709, 4 L. Ed. 2d 1508, 80 S. Ct. 1331.) For reasons later to appear, we do not believe the statute is ambiguous; but even if ambiguity be assumed, the rule of construction relied upon cannot be employed in this case. As the rule itself recognizes, executive or administrative construction is not binding on the courts if it is erroneous (*P. H. Mallen Co.* v. *Department of Finance,* 372 Ill. 598; *Superior Coal Co.* v. *Department of Revenue,* 4 Ill. 2d 459), and in our opinion the "burn off" construction is constitutionally impermissible.

That construction of the statute, to repeat, measured the tax by the amounts of fuel consumed by United's planes in and over Illinois as they proceeded on their interstate journeys. And while it is difficult to see how such a construction could be derived from statutory language which grants exemption to temporarily stored property that is used "solely outside of this State," it is sufficient to say that the construction runs afoul of the commerce clause of the United States constitution. Decisive and binding authority for this conclusion is found in *Helson* v. *Kentucky* (1929), 279 U.S. 245, 73 L. Ed. 683, 49 S. Ct. 279, determined under facts which, in effect at least, cannot be distinguished from those of the present case. Involved there was an Ohio river ferry operated exclusively in interstate commerce between Kentucky and Illinois. Gasoline used to power the

ferry was purchased and delivered in Illinois, situs of the residence and business of the operator, and it was stipulated that "75 per cent of this gasoline was actually consumed within the limits of Kentucky, *but all of it in the making of interstate journeys.*" (279 U.S. at 248; emphasis added.) Issue arose when Kentucky sought to impose a tax on the gasoline consumed within its limits under a statute which, *inter alia*, authorized a tax on gasoline purchased "without the state" but used "within the state." Overruling Kentucky courts, the Supreme Court found under the circumstances that the gasoline was an instrumentality of interstate commerce, thus causing the tax to be "exacted as the price of the privilege of using an instrumentality of interstate commerce," (279 U.S. at 252), and struck it down as being an invasion of the exclusive power of Congress to regulate such commerce.

Our own statute must be held subject to the same infirmity when the amount of fuel consumed, or "burned off," within the limits of Illinois is made the incidence and measure of the use tax. All of the fuel over which controversy has arisen is consumed in the making of interstate journeys, and once the engines of a plane are started in Illinois, it can be said unequivocally that the fuel becomes an instrumentality of interstate commerce. Under the compulsion of *Helson*, to impose a tax based upon consumption within Illinois is to exact a tax on the privilege of using the fuel in interstate commerce. (*Cf. Shell Oil Co.* v. *State Board of Equalization*, 64 Cal.2d 713, 414 P.2d 820, 827; *Texas Gas Transmission Corp.* v. *Benson* (Tenn.), 444 S.W.2d 137; *W. R. Grace & Co.* v. *Comptroller of the Treasurer*, 255 Md. 550, 258 A. 2d 740) And there is more here than was involved in *Helson*. United's planes pass over many States. They do not refuel in each State, but fuel loaded here is necessarily used or consumed over and within each State. Should every State wherein fuel is consumed seek to impose a use tax

measured by the amounts of fuel consumed within its borders, an intolerable burden on interstate commerce would result. *Cf. United Air Lines, Inc.* v. *Illinois Commerce Com.*, 32 Ill.2d 516.

Seeking to avoid the impact of *Helson*, United argues that the placing and presence of the fuel in departing planes is but a continuation of temporary storage; that the burning of fuel in and over Illinois is simultaneously consumption and the termination of temporary storage, and that the release from storage as the plane is operated in Illinois is a local event, or use, properly taxable by Illinois. Or, to put it another way, United asserts that all fuel placed in the tanks of its planes continues to be exempt under the temporary storage provision of our Act, and that the exemption is lost, and the fuel subject to the tax, only to the extent of the fuel released from the tanks for consumption in and over Illinois.

While we entertain grave doubts that *Helson* could be evaded by the fine distinction between "consumption" and "simultaneous consumption and termination from storage," and believe it probable that the fuel becomes an instrumentality of interstate commerce when it is loaded on a plane, the basic premise of the construction advanced is a faulty one. The placing and presence of the fuel in the tanks of aircraft may be "storage" in a special or technical sense, but we think it clear that the legislature did not intend for the temporary storage exemption to extend to "storage" of such nature. It is axiomatic that the words used in a statute should generally be given their plain and ordinary, or commonly accepted meaning, unless to do so would defeat the manifest intent of the legislature. (See: 34 I.L.P., Statutes, § 117.) Here the statutory references are to "the temporary storage, in this State," of tangible personal property, and to such property "stored here temporarily." The noun

"storage" is specifically defined as meaning "the act of depositing in a store or warehouse for safekeeping" and, consistent therewith, the verb "store" is defined as meaning "to deposit in a store or warehouse for safekeeping." (See: Webster's New Twentieth Century Dictionary, 2d ed., pp. 1795 and 1796; *Bandosz* v. *A. Daigger and Co.*, 255 Ill. App. 494, 499.) It may be observed, too, that such meanings are consistent with the legislative purpose of exempting only temporarily stored property used solely outside Illinois. Fuel is not placed or present in the tanks of an airplane for the purpose of safekeeping, and there is no rule of construction which permits a court to say that the legislature did not mean what the plain language of a statute imports. (*Western National Bank of Cicero* v. *Village of Kildeer*, 19 Ill.2d 342.) Appropriate here, in light of United's effort to attribute a special or technical meaning to the language of the Act, is the observation in *People* v. *Day*, 321 Ill. 552, 555, which states: "What the framers of a statute would have done had it been in their minds that a case like the one here under consideration would arise is not the point to be considered. The inquiry is what, in fact, they did enact, probably without anticipating the existence of such facts." We conclude that the "burn off" construction was improper and that it cannot prevail as United insists.

Next to be determined is the proper construction of the temporary storage provision of the Act and, in relation thereto, the positions and arguments of the parties focus upon *Edelman* v. *Boeing Air Transport, Inc.* (1933), 289 U.S. 249, 77 L. Ed. 1155, 53 S. Ct. 591. In that case the State of Wyoming imposed a tax on all gasoline used or sold in the State. Boeing, which operated out of two airports within the State, maintained an air service for transporting passengers, mail and express in interstate commerce. It purchased gasoline both within and without the State which was intermingled and stored in tanks at the airports from

whence it was either sold or put into Boeing's own planes. Tax liability was admitted for the portions of the gasoline sold or used in intrastate flights, but, in apparent reliance on *Helson*, it was contended that the tax could not be validly applied to so much of the gasoline imported from outside the State as was loaded from the storage tanks into planes that consumed it in interstate flights. Rejecting this contention, the court said: "As the statute has been administratively construed and applied, the tax is not levied upon the consumption of gasoline in furnishing motive power for respondent's interstate planes. The tax is applied to the stored gasoline as it is withdrawn from the storage tanks at the airport and placed in the planes. No tax is collected for gasoline consumed in respondent's planes either on coming into the State or on going out. It is at the time of withdrawal alone that 'use' is measured for the purposes of the tax. The stored gasoline is deemed to be 'used' within the State and therefore subject to the tax, when it is withdrawn from the tanks. * * * A State may validly tax the 'use' to which gasoline is put in withdrawing it from storage within the State, and placing it in the tanks of the planes, notwithstanding that its ultimate function is to generate motive power for carrying on interstate commerce. Such a tax cannot be distinguished from that considered and upheld in *Nashville, Chattanooga & St. Louis Ry.* v. *Wallace, supra.* [288 U.S. 249.] There it was pointed out that 'there can be no valid objection to the taxation of the exercise of any right or power incident to * * * ownership of the gasoline which falls short of a tax directly imposed on its use in interstate commerce, deemed forbidden in *Helson* v. *Kentucky*, 279 U.S. 245. As the exercise of the powers taxed, the storage and withdrawal from storage of the gasoline, was complete before interstate commerce began, it was held that the burden of the tax was too indirect and remote from the function of interstate commerce, to transgress constitutional limitations." 289 U.S. at 251, 252.

Our own statute defines a taxable "use" as being "the exercise by any person of any right or power over tangible personal property incident to the ownership of such property" (Ill. Rev. Stats. 1961 and 1969, ch. 120, par. 439.2), and it is the contention of defendants that a taxable use occurs when United withdraws its fuel from storage and places it in its planes. United agrees that either storage (*Wallace*, 288 U.S. 249), or withdrawal from storage (*Edelman*), are the exercise of rights which might have been constitutionally taxed under our Act. It insists, however, that our legislature waived the right to tax either event when it enacted the temporary storage provision, and from this position argues that if the loading on the aircraft is intended as the taxable event, then the tax is constitutionally improper as being imposed upon an integral activity of interstate commerce. (*Cf. Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 98 L.Ed. 583, 74 Ct. 396; *Puget Sound Stevedoring Co.* v. *Tax Com.*, 302 U.S. 90, 82 L.Ed. 68; *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 91 L.Ed. 993; *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69, 91 L.Ed. 80.) But both parties, in our view, oversimplify the problem by failing to consider the specific language of the Act, which we are bound to construe so that all of its provisions are given effective meaning. *People ex rel. Barrett* v. *Barrett*, 31 Ill. 2d 360; *Pliakos* v. *Liquor Control Com.*, 11 Ill.2d 456.

In language which we find to be plain, simple and unambiguous, the Act has granted exemption to "the temporary storage, in this State, of tangible personal property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, *is used solely outside this State.*" (Emphasis added.) Exemption is thus granted only as to tangible personal property which is stored here temporarily and which, upon withdrawal from storage, is to be used solely outside Illinois.

To put it another way, the legislature has stated that the temporary storage and the withdrawal therefrom are not taxable uses, if the property in question is to be used solely outside the State. It is clear that if United was to withdraw its fuel from storage at Des Plaines and the airports and transport it outside the State for use elsewhere, as for example at an airport in nearby Wisconsin, the exemption would apply and neither the storage, nor the withdrawal, nor the transportation of the fuel outside the State would be uses subject to the tax. But United does not store in Illinois with any intention that the fuel will be used solely outside this State. Rather, the fuel is stored here only to facilitate United's operations from the O'Hare and Midway airports within the State. Under the circumstances, the "storage" becomes something more than a "temporary storage" for safekeeping prior to its use solely outside of Illinois. Such storage, under the plain words of the statute, does not qualify under the temporary storage exemption and, as the authorities already discussed reveal, either the storage itself or the withdrawal therefrom are uses which may be taxed without offending the commerce clause of the Federal constitution.

Contention is next made that the Department, in applying the tax, has done so in such a manner as to violate the provision of section 1 of article IX of the Illinois constitution which requires taxation to be "uniform as to the class upon which it operates." However, there is no proof in this record that there has been a lack of uniformity or discrimination within the class of taxpayers affected, and as a consequence there is nothing which permits us to determine the issue sought to be raised. It may be added, too, that this contention is erroneously premised on a theory that the fuel stored by United is eligible for the protection of the temporary storage exemption, and that the tax has been laid on either the withdrawal of the fuel from storage or

its transportation outside the State. In either event, the constitutional claim made must be found to be without merit.

For the reasons stated, the judgment of the circuit court of Cook County is affirmed.

*Judgment affirmed.*

Mr. Chief Justice Underwood specially concurring:

I agree that Illinois may constitutionally collect the tax imposed in this case on all of the fuel loaded on United's planes at the airports. I am, however, not at all certain that application of the "burn off" rule would, as the opinion indicates, be constitutionally impermissible if the statute so provides. In my opinion the statute does not so provide, but rather clearly exempts the fuel in question here only when "used solely outside this State". I do not consider discussion of the "burn off" rule necessary to the decision, and would affirm on what I consider to be the plain meaning of the statutory language.

Mr. Justice Goldenhersh joins in this concurrence.

Mr. Justice Kluczynski, dissenting:

I disagree with the majority's conclusion that the interpretation of section 3 of the Use Tax Act (Ill. Rev. Stat. 1955, ch. 120 par. 439.3) as originally given by the Department of Revenue was erroneous and that such an interpretation would be violative of the commerce clause.

The events of storing fuel in Illinois or the taking of fuel from storage in Illinois are constitutionally taxable under our Act because the events are complete before interstate commerce begins. (*Nashville, Chattanooga & St. Louis Railway* v. *Wallace*, 288 U.S. 249, 77 L. Ed. 730, 53 S. Ct. 345; *Edelman* v. *Boeing Air Transport, Inc.*, 289 U.S. 249, 77 L. Ed. 1155, 53 S. Ct. 591.) Thus a tax measured by the value of the entire tank of fuel is consti-

tutionally permissible and it follows that a tax measured by something less would also be permissible.

Section 3 of the Act in part provides: "To prevent actual or likely multistate taxation, the tax herein imposed shall not apply to the use of tangible personal property in this State under the following circumstances: * * * (d) the temporary storage, in this State, of tangible personal property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, is used solely outside this State * * *." (Ill. Rev. Stat. 1955, ch. 120, par. 439.3.) I believe that this section exempts that portion of the fuel which "stored here temporarily, is used solely outside this State." The intent of the owner when the fuel is placed in the tanks of the airplane is that a certain portion will be consumed in the State of Illinois. This portion is no longer exempt under section 3 and therefore taxable. The remainder of the fuel is stored in the tanks for use solely outside the State of Illinois and keeps its exempt status while in the tanks.

Such an interpretation was given to the exemption from its enactment in 1955 until June 3, 1963, when the Department of Revenue changed its position so that a tax, measured by the value of the entire tank of fuel, is imposed when fuel is taken out of a storage tank and placed into tanks of the airplane. I believe, however, that the original construction given to the statute is correct for the following reasons: First, it is a reasonable construction of the wording of the exemption which admittedly is capable of other reasonable interpretations when applied to the facts of this case.

Secondly, the construction given to the statute at the time of enactment by the agency administering the statute is entitled to substantial weight. Before the Governor signed the Use Tax Act in July, 1955, the Department of

Revenue, in response to an inquiry by the Honorable Paul Randolph (member of Illinois House of Representatives, Chairman of the Revenue Committee of the House and member of the joint House-Senate Conference Committee which recommended the Use Tax Bill for passage), stated in a letter to him its intent as to how it would administer the Act. The letter was written on July 12, 1955, by Willard Ice, then Supervisor, Rules and Regulations Division of the Department of Revenue, and stated that if a carrier purchased fuel outside of the State "and some of the items or units thereof (such as so many gallons of gasoline) are used in Illinois and some of the items or units thereof (such as so many gallons of gasoline) are used outside of Illinois, the carrier would be liable for the use tax on the items used in Illinois, but not on the items used outside of Illinois assuming that the carrier keeps adequate records to segregate the non-taxable from the taxable items."

Thirdly, the exemption as originally construed, had been applied continuously and uniformly for an extended period of time. And finally, during the eight years when the Department's original construction was in effect, the Illinois legislature amended section 3 of the Use Tax Act, at least once each session without repudiating the Department's construction. Thus, the legislature gave implied consent to the construction by nonaction on its part. See: *Canada Packers, Ltd.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 385 U.S. 182, 17 L. Ed. 2d 281, 87 S. Ct. 359; *Cory Corp* v. *Sauber*, 363 U.S. 709, 4 L. Ed. 1508, 8 S. Ct. 1331; *United States* v. *Leslie Salt Co.*, 350 U.S. 383, 100 L. Ed. 441, 76 S. Ct. 416; *People ex rel. Spiegel* v. *Lyons*, 1 Ill. 2d 409; *Illinois Bell Telephone Co.*, v. *Commerce Com.*, 414 Ill. 275.

For these reasons I would reverse the judgment of the circuit court of Cook County.

SCHAEFER and DAVIS, JJ., join in this dissent.

UNITED STATES OF AMERICA

State of Illinois
Supreme Court } ss.

At a Term of the Supreme Court, *begun and held in Springfield, on Monday, the thirteenth day of September in the year of our Lord, one thousand nine hundred and seventy-one, within and for the State of Illinois.*

Present: Robert C. Underwood, Chief Justice

Justice Walter V. Schaefer
Justice Thomas E. Kluczynski
Justice Daniel P. Ward
Justice Charles H. Davis
Justice Joseph H. Goldenhersh
Justice Howard C. Ryan

William J. Scott, Attorney General
Robert G. Miley, Marshal
Attest: Justin Taft, Clerk

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Be It Remembered, that, to-wit: on the 4th day of October, A.D. 1971, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

United Air Lines, Inc.,

Appellant

No. 42042 vs.

Theodore A. Jones, Director of Revenue of the Department of Revenue of the State of Illinois, William G. Clark, Attorney General of the State of Illinois, Adlai E. Stevenson, III, Treasurer of the State of Illinois, and Shell Oil Co., a Delaware corporation,

Appellees

Appeal from Circuit Court Cook County 63 C 17049

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And now, on this day, the Court having duly considered the petition for rehearing filed herein, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a rehearing in this cause.

No. 42042

IN THE

SUPREME COURT OF ILLINOIS

UNITED AIR LINES, INC.,
Plaintiff-Appellant,

vs.

GEORGE E. MAHIN, Director of Revenue of the Department of Revenue of the State of Illinois, WILLIAM J. SCOTT, Attorney General of the State of Illinois, ADLAI E. STEVENSON, III, Treasurer of the State of Illinois, and SHELL OIL CO., a Delaware corporation,
Defendants-Appellees.

## NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that United Air Lines, Inc., appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Illinois, entered April 1971, rehearing denied, October 4, 1971.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ MARK H. BERENS
Counsel for Appellant

Filed: December 20, 1971
Mayer, Brown & Platt
231 South LaSalle Street
Chicago, Illinois 60604

[Certificate of Service omitted]

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*Abt* v. *Department of Revenue*, 34 Ill. 2d 324, 215 NE 2d 243 (1966) ..... 16

*Marshall & Huschart Co.* v. *Department of Revenue*, 18 Ill. 2d 496, 165 NE 2d 165 (1960)..... 16

*Metnick* v. *Department of Revenue*, 28 Ill. 2d 180, 190 NE 2d 750 (1963)..... 16

*Superior Coal Company* v. *Department of Revenue*, 4 Ill. 2d 459, 123 NE 2d 713 (1954) ..... 16

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## STATUTES

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-862

UNITED AIR LINES, INC.,

*Appellant,*

vs.

GEORGE E. MAHIN, et al.,

*Appellees.*

On Appeal from the Supreme Court of Illinois

## MOTION TO AFFIRM

Appellees, George E. Mahin, Director of Revenue of the Department of Revenue of the State of Illinois, William J. Scott, Attorney General of the State of Illinois, and Adlai E. Stevenson, III, Treasurer of the State of Illinois, by William J. Scott, Attorney General of the State of Illinois, attorney for said appellees, pursuant to Rule 16 of the Revised Rules of the United States Supreme Court, move that the decision of the Illinois Supreme Court

herein be affirmed on the ground that the decision of the Illinois Supreme Court is clearly correct and, therefore, it is manifest that no question so substantial as to warrant further argument is raised.

## ISSUES PRESENTED

Appellees respectfully disagree with appellants as to the issues presented as set forth at pages 3 and 4 of Appellant's Jurisdictional Statement, and suggest that appellants more accurately stated the issues presented for review in its brief to the Illinois Supreme Court, where it was stated:

The ultimate issue to be decided by this case is how to apply the Use Tax Act (*Ill. Rev. Stat.* 1967, Ch. 120, §§ 439.1 *et seq.*) to aviation fuel purchased by United in Indiana, brought into Illinois by United, which, after being temporarily stored in ground storage tanks here, is loaded aboard United's aircraft at O'Hare and Midway airports, and is used to propel them on flights in interstate and foreign commerce.* Of decisive importance is the temporary storage provision of the Use Tax Act, *id.*, § 439.3 (6th unnumbered ¶),** which excludes from the application of the use tax:

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* United pays the Illinois use tax on all fuel loaded on its intrastate flights between Chicago and Moline, so that fuel is not involved in this case.

** Several sections of the Use Tax Act were amended by the Illinois Legislature during 1969, including § 439.3 by Public Act 76-249, Laws 1969, p. . . . These amendments will not be cited except when relevant to the discussion.

"'. . . (d) the temporary storage, in this State, of tangible personal property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, is used solely outside this State.'"

**A. Issues Raised by the Department's Bulletin of June 3, 1963.**

"From the effective date of the Use Tax Act in August 1955, until June 3, 1963, the Illinois Department of Revenue "uniformly and consistently interpreted and applied" the law so as to impose use tax on fuel temporarily stored in Illinois *only to the extent it was actually consumed or burned in or over Illinois.* (Additional Stip., §1.) Correlatively, the fuel loaded in Illinois that remained unburned in the tanks of the aircraft or other vehicle as it crossed the Illinois border leaving the State was treated as within the scope of the temporary storage provision. This approach is known as the "burnoff" rule.

"On June 3, 1963, the Department of Revenue changed its interpretation by a Bulletin (United ("UA") Ex. 3) that would impose Illinois use tax on *all* fuel transferred from ground storage into the fuel storage tanks of a common carrier airplane, railroad engine or truck, regardless whether or not such fuel was actually burned in or over Illinois. The theory of the Bulletin is that the transfer from ground storage is of itself a taxable use which terminates the non-taxable temporary storage.*

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*The Department does not seek to tax any of the fuel brought into Illinois in the tanks of interstate carriers. Such taxation is specifically prohibited by the Commerce Clause of the Federal Constitution as a burden on interstate commerce. See *Helson & Randolph* v. *Kentucky*, 279 U.S. 245 (1929), and cases cited at p. 64, *infra*.

"This suit challenges the validity of the Department's June 3, 1963, Bulletin, and presents the following issues for review:

"1. Whether the new interpretation in the Bulletin '. . . that temporary storage ends and taxable use occurs when the fuel is taken out of storage facilities and is placed into the tank of the airplane, railroad engine or truck' is an erroneous and unreasonable interpretation of the temporary storage provision of the Use Tax Act (*id.*, §439.3);

"2. Whether such interpretation, which would treat temporary storage as ended when fuel is loaded in the tanks of a common carrier airplane, railroad engine or truck, but not as ended for fuel or other goods transported from the State by any other means (including for fuel, transportation by pipeline, tank truck, or tank car), is an unreasonable and discriminatory classification against common carriers generally, and against airlines in particular, thereby violating the uniformity requirements of the Revenue Article (Art. IX, § 1) and the Due Process Clause (Art. II, § 2) of the Illinois Constitution and the Due Process Clause of the Fourteenth Amendment to the Federal Constitution;

"3. Whether the application of use tax to all fuel loaded for use in interstate and foreign commerce violates the Commerce Clause (Art. I, § 8, cl. 3) of the Federal Constitution;

"4. Whether the application of use tax to fuel burned outside Illinois constitutes an extra-territorial extension of Illinois' taxing power in contravention of the Due Process Clause of the Fourteenth Amendment to the Federal Constitution."

**B. Issues Raised by the Trial Court's Decision.**

"The trial court did not decide any of these statutory or constitutional issues. Instead, it held, in effect, that the requirement of the temporary storage provision that the stored property be used "solely" outside Illinois required that United prove that *absolutely none* of the stored fuel had been burned in Illinois by any of its flights since July 1, 1963. The court then found that United had not met this burden of proof. (Opinion, pp. 3-4, 5.)

"The court further held that the temporary storage provision applies only if property stored in Illinois is sold or resold outside the State, but not if the owner himself uses or consumes the property outside the State. (Opinion, p. 6.)

"Both of the trial court's holdings in effect repudiate the burnoff rule."

"The trial court's decision raises the following issues, none of which were briefed or argued by the parties below:

"1. Whether *all* of a quantity of *fungible* goods temporarily stored in Illinois is subject to use tax because a *portion*, even *de minimis* amounts, of such stored quantity is used in Illinois.

"2. Whether the trial court erred in not finding, in accordance with United's uncontroverted evidence, that United's departing aircraft consume in Illinois no, or no more than *de minimis* amounts of, fuel loaded in Illinois.

"3. Whether the temporary storage provision applies only to property which eventually is sold or resold outside Illinois."

* * *

"The foregoing issues must be considered in light of the undisputed fact that only a small portion of the fuel loaded by United in Illinois is, or can be, burned in the State by its departing aircraft."

## OPINIONS BELOW

The opinion of the trial court is attached hereto as Appendix "A". The opinion of the Illinois Supreme Court, which affirmed the trial court's opinion, is attached hereto as Appendix "B".

Appellees hesitate to be so presumptuous as to explain to this Court the rationale relied upon by both the trial court and majority of the Illinois Supreme Court in affirming the trial court's decision.

Appellant, in characterizing the decision below, apparently attempts to re-argue the interpretation of the Illinois Use Tax Act that was adopted both by the trial court and by a majority of the Illinois Supreme Court and to represent and re-argue its theory of the so-called "burn-off" proposition. Appellant, in its brief to the court below, talked of many things. It talked of burn-off, of consumption, of "cabbages and kings", of constitutional provisions and theories of temporary storage, but concedes that, if the temporary storage provisions of the Illinois Use Tax Act did not apply to the incidence in question, it is then subject to the Illinois Use Tax.

In its brief before the Illinois Supreme Court, appellant stated at pages 26-27:

> "United concedes that any of the acts of importing fuel, storing it, loading it aboard aircraft, and transporting it from the State each constitute the '. . . exercise . . . of . . . a right or power over tangible personal property incident to the ownership of that property'

(Ill. Rev. Stat. 1967, Ch. 120, § 439.2; *Philco Corp.* v. *Department of Revenue*, 40 Ill. 2d 312, 326-27 (1968), which would constitute a taxable use in this State, except for the temporary storage provision. That provision, and the language introducing it, reads (Ill. Rev. Stat. 1967, Ch. 120, § 439.3 (6th unnumbered para.)):

> 'To prevent actual or likely multistate taxation, the tax herein imposed shall not apply to the use of tangible personal property in this State under the following circumstances:
>
> '(d) the temporary storage, in this State, of tangible personal property which is acquired outside this State and stored here temporarily, is used solely outside this state . . .'

"Four conditions are necessary for the temporary storage provisions to be operative:

(i) the property, i.e., the fuel must be purchased outside the State by the taxpayer;

(ii) it must be brought into the State by the taxpayer;

(iii) it must remain in storage while in Illinois; and

(iv) its eventual use, after storage in Illinois terminates, must be solely outside the State."

Appellees understand that statement to mean that if the temporary storage provision of the Use Tax Act does not apply to appellant, it concedes the taxability of their transactions and that all their other arguments concerning Federal Constitutional questions amount to naught.

American Air Lines, Braniff Air Lines and Northwest Airlines in their brief as *amicus curiae* before the Illinois Supreme Court conceded that the court must disregard the statutory definition of "use" and read into the Act meanings that are not set forth therein in order to reach a decision favorable to the position of the airlines (Brief of Amicus Curiae, pp. 13-14).

Appellees respectfully call to this Court's attention that in the opinion of the trial court it was specifically held that both the Illinois Use Tax Act and the interpretation placed upon it by the Department of Revenue were proper and valid and did not violate any of the State or Constitutional provisions as claimed by appellants (App. A, p. 5).

Appellees also respectfully point out that the decision of the majority of the Illinois Supreme Court rejected the constitutional issues raised by appellant and that even the dissents did not accept the constitutional arguments of United but merely quarreled with the construction of the Act in question as construed by the majority of the Court.

## ADDITIONAL STATEMENT OF FACT

Appellees do not concede that there is no controversy as to the facts, and insist that United's statement is not complete and that there is a serious dispute as to the inferences to properly be drawn from those facts.

For example: in the very first paragraph of the Facts, stated by Appellant, (p. 6, Jurisdictional Statement), it is stated:

> "All of the aviation fuel involved in this case is purchased from the Shell Oil Co. and delivered to United in Indiana. The purchase is subject to Indiana gross income tax, currently at a rate of ½% of the purchase price.* The fuel is transported by common carriers to O'Hare and Midway airports in Chicago, where it is stored only for such period as is nec-

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*Burns Ind. Stat. Ann. tit. 64, ch. 26, §§ 64-2601 to 64-2603. Pursuant to the contract with Shell, United is obligated to pay this tax, which amounted to approximately $403,000 for the period between July 1, 1963 and December 31, 1967, and $150,000 for 1968. The Indiana tax continues to be imposed on such purchases.

essary for purification and United's operational needs. All of it is pumped into aircraft fuel tanks, almost always immediately prior to departures by flights in interstate or foreign commerce.** "

Appellees assert that the purchase is not subject to the Indiana Gross Income Tax at the time the alleged purchase takes place in Indiana, but that Shell Oil Company is obligated to pay a Gross Income Tax to the State of Indiana on all of the sales that it allegedly makes in Indiana, and that the contract referred to in the first footnote on page 6 of the Jurisdictional Statement is part of a scheme to avoid payment of the Illinois Retailers' Occupation Tax. (Ch. 120, Sec. 440, et seq., Ill. Rev. Stat. 1969)

The whole purpose of storing the fuel in Indiana is to create the appearance of a sale of fuel taking place in Indiana so that the parties are subject to the Indiana Income Tax, currently at the rate of ½% of the purchase price, rather than the Illinois Retailer's Occupation Tax or the Illinois Use Tax, both of which taxes are currently at the rate of 5%. Appellees respectfully suggest that a fair interpretation of the facts is as follows:

United Air Lines and American Air Lines purchase turbine jet fuel for their jet-propelled airplanes and aviation gasoline for their piston-driven airplanes from Shell Oil Company (R. 224, 330). Approximately 20% of the turbine fuel is refined at Shell's refineries either at Houston, Texas or Norco, Louisiana. The balance is refined at Shell's refinery at Wood River, Illinois which is located very close to East St. Louis, Illinois. The fuel from Texas and Louisiana is shipped to Wood River where it is commingled with the fuel refined at Wood River (R. 268, 269). This turbine fuel is then transported by Shell from Wood River, Illinois, a distance of 250 miles to storage tanks in East Chicago and Hammond, Indiana (R. 212). It should be

**No intrastate flights are involved in this litigation.

noted that East St. Louis is approximately 280 miles from the Chicago area. The fuel is stored in these facilities, which are owned by Shell Oil Company, until United or American requests fuel. United purchases approximately 18,000,000 gallons of turbine fuel from Shell per month. It pays Shell approximately $1,800,000.00. per month (R. 236). Upon receipt of an order from the agents of United (R. 224), Shell delivers the requested fuel to West Shore pipeline at Hammond, Indiana, for delivery to storage tanks located at Des Plaines, Illinois (R. 216). West Shore is a common carrier pipeline owned by 10 oil companies, with Shell having 20% stock interest in it (R. 216). Through this pipeline the turbine fuel for both United and American is transported to storage facilities located at Des Plaines, Ill. (R. 218, 219). These storage facilities at Des Plaines, Illinois are owned by Shell Oil Company and are leased by Shell to United and American (R. 219). The rental fee paid by the airlines to Shell is determined by the volume of "put through" at the storage facilities (R. 220). At all times to this point, the turbine fuel ultimately to be delivered to United and American is commingled (R. 225, 295). Shell also owns the pipeline which connects the Des Plaines storage facilities to the storage facilities at O'Hare Airport. These pipelines are also leased by Shell to United and American (R. 246, 248, 225). Lockheed Air Terminal Corporation, as agent of United and American, operates and manages the storage facilities at Des Plaines and the pipelines connecting Des Plaines with O'Hare Airport (R. 222, 245, 332). From the time the turbine fuel leaves Shell's facilities at Wood River, Illinois, until it reaches United and American's storage facilities at O'Hare, it is never under the physical control of an employee of either United or American. It would be physically possible for Shell to deliver the fuel in question to the respective airlines at O'Hare Airport (R. 260, 313, 314). It is not until the turbine fuel reaches O'Hare Airport that it is metered to

determine the quantity of fuel being purchased by American and United. At this point at O'Hare, United and American have underground storage facilities respectively under their control independent of Shell Oil Company (R. 334). The storage facilities are owned by the City of Chicago and leased to the airlines (R. 344). It is at this point of metering into the respective storage facilities of United and American at O'Hare that for the first time there is a separation of the turbine fuel as between United and American. As a result of the sale and delivery arrangements heretofore described, United claims it is not liable for any Use Tax and Shell claims it is not liable for any Retailers Occupational tax (hereinafter referred to as R.O.T. tax) on the purchase of turbine fuel involved (R. 324, 325). After the fuel is delivered to the respective airlines at their O'Hare storage tanks, it is then loaded by them into their jet airplanes.

United Air Lines at the time in question had an approximate average of 234 take-offs and 234 landings from Chicago per day (R. 42). Some of these flights were 'through' flights; others were what the industry calls 'short, turn-around' flights (R. 44). On a short turn-around flight, the airplane arrives and, in a relatively short period of time, generally from one to three or four hours, would turn around and proceed to another destination with another flight number (R. 43). On through flights the planes are on the ground for a relatively shorter length of time (R. 45).

United is subject to certain controls by the Federal Aviation Agency (Rept. of Proceedings p. 79). Among these controls exercised by the FAA over airlines under its jurisdiction, is the requirement that they carry a sufficient fuel reserve to permit them to fly to airports beyond their intended destination. It is the contention of plaintiffs-appellants that each of its aircraft on landing has from two to

seven times as much fuel as would be required for it to depart from Illinois (Plaintiff-Appellant's Brief p. 18). United then argues that since the reserve fuel is at a colder temperature when the aircraft is re-fueled a stratification takes place causing the colder reserve fuel to rest on the bottom and the warmer, newly-inserted fuel to rise to the top. From this they argue that none of the fuel put in its aircraft at O'Hare would be burned over the State of Illinois. It was conceded that United's expert witness stated that scientifically, there is no difference between the mixing of cold and hot fuel than there is between mixing cold and hot water (R. 183). The leasing agreements between Shell and United for the facilities at Des Plaines and the facilities leading from Des Plaines to O'Hare are conditioned upon United's continuing use of Shell's fuel. If Shell were required to pay a Retailers' Occupation Tax on sales to United, or if United was required to pay the Use Tax at issue is some $90,000.00 per month or approximately $1,080,000.00 of revenue to the State of Illinois per year.

Finally, it must be pointed out that while Shell pays no sales tax or Retailers' Occupation Tax to the State of Indiana (R. 323), neither United nor American pay any sales or use taxes to any state (R. 235) on the purchase of the fuel involved herein .

## ARGUMENT

### I.

### THE IMPOSITION OF THE ILLINOIS USE TAX ON THE FACTS BEFORE THE COURT DOES NOT VIOLATE THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

Appellant, in the Illinois Supreme Court, had argued that the essence of the trial court's error was its failure to recognize that fuel is fungible. Appellees pointed out that the Illinois Use Tax does not depend on molecular niceties. The statute, which is controlling, makes no more reference to "fungible" than it does to "consumption" or to "burn-off". Appellant, before the Illinois Supreme Court, was obsessed with an attempt to write into the statute all three of the above terms. The statute uses the term "tangible personal property" and makes no effort to incorporate the novel term "fungible" as appellant suggested.

Likewise, the term "consumption" does not appear in the above definition of "use" or "tangible personal property" as defined by the legislature in the Use Tax Act. Appellant enjoyed a tremendous tax benefit by electing to pay the Use Tax on a burn-off principle. This past practice on the part of appellant led it to urge that the Use Tax Act is a property tax measured by the consumption rate in this State. This position is untenable and would violate the Constitution of the State of Illinois. *Turner* v. Wright, 11 Ill. 2d 161, 142 N.E. 2d 84 (1957); *Helson* v. *Kentucky*, 279 U.S. 245 (1929).

While the scope and effect of the various provisions of the Revenue Act emerged to the present state through a series of decisions of the Illinois Supreme Court akin to a process of evolution, the effect of the commerce clause of the federal constitution has also been subject to a series of decisions which, in effect, could be called evolutionary.

*Helson* v. *Kentucky, supra,* involved a ferryboat operated in interstate commerce between Illinois and Kentucky. The boat was loaded with gasoline in Illinois but ran through Kentucky water for the better part of its journey before stopping in an Illinois port. Kentucky sought to tax the use of the gasoline actually consumed within its waters. The court held that the tax violated the commerce clause because in essence it was exacted as the price of the privilege of using an instrumentality in interstate commerce—a direct burden on such commerce. But in a series of subsequent cases the court upheld the imposition of a use tax if there was a taxable event preparatory to commitment of the tangible personal property in interstate commerce, e.g., *Southern Pacific Co.* v. *Gallagher,* 306 U.S. 167 (1938) (storage and installation of certain equipment), and *Edelman* v. *Boeing Air Transport, Inc.,* 289 U.S. 249 (1933) (withdrawal of gasoline from storage). While these later cases limit the reach of the *Helson* principle, it appears that imposition of the Illinois Use Tax on the burned-off basis would still run afoul of that principle. "Burned-off" is just a shorthand way of saying actually consumed, and if the time for levying the use tax is delayed until the fuel is actually consumed, until it is being employed to propel a vehicle on any interstate commerce journey, the Helson case would apply to make such a levy unconstitutional. It would also appear to follow that United's contention that the fuel not actually consumed

within Illinois but loaded aboard the aircraft escapes the use tax through the temporary storage provision is immaterial, because if the use of the fuel has escaped taxation before it has been committed to interstate commerce, it cannot be taxed thereafter, whether there is a temporary storage provision or not.

The first inquiry then becomes whether, upon the facts as stated above, there is an event upon which Illinois may impose the tax without violating the commerce clause. A review of the cases establishes that multiple taxable events are present. The first of these is the storage and withdrawal from storage at the Des Plaines tank (*Nashville, Chattanooga & St. Louis Ry. Co.* v. *Wallace,* 288 U.S. 249 (1933), and *Edelman* v. *Boeing Air Transport, Inc.,* 289 U.S. 249 (1933). In *Wallace,* Tennessee imposed the tax on "... the (gas) to be withdrawn from storage whether such withdrawal be for sale or other use", Ch. 58, Tenn. Publ. Acts, 1923, as amended, Ch. 67, Tenn. Publ. Act, 1925. The court held that the power to tax property—the sum of all the rights and powers incident to ownership—means the States can tax the successive exercise of two of the powers incident to its ownership, storage and withdrawal from storage, both completed before interstate commerce begins. (Also pointed out in *Edelman, supra*).

United stores and withdraws its fuel at least twice, once at Des Plaines where it allows the fuel to become commingled with that of other airlines, and then to O'Hare, and then withdraws it from storage preparatory to loading it aboard its aircraft and has thus committed taxable events or 'uses' not violative of the commerce clause.

It appears equally certain that United's acts constitute taxable events within the meaning of the Illinois Use Tax as well. Recall the language of the Act, "... 'use' means

the exercise by any person of any right or power over tangible personal property incident to the ownership of that property . . .". Any right or power includes United's loading the fuel aboard its planes, and through its agent, the Lockheed Company, storing and withdrawing from storage. The General Assembly has provided a definition of "use" in the Use Tax Act, but allowed the courts to formulate its own under the retailers' tax.

Attempts to defeat the imposition of the Retailers' Occupation Tax Act were unsuccessful in the following cases: *Young* v. *Hulman,* (1967) 39 Ill. 2d 219, 234 NE 2d 797, so-called agency sales; *Abt* v. *Department of Revenue,* (1966) 34 Ill. 2d 324, 215 NE 2d 243, ice cream sold to boys 14 years old and upwards on consignment; *Marshall & Huschart Co.* v. *Department of Revenue,* (1960) 18 Ill. 2d 496, 165 NE 2d 165, limited agent with authority only to solicit orders, and *Metnick* v. *Department of Revenue,* (1963) 28 Ill. 2d 180, 190 NE 2d 750, delivery of cars to non-residents of the City of Chicago by driving the cars with the customer across the city boundary line.

In *Superior Coal Company* v. *Department of Revenue* (1954) 4 Ill. 2d 459, 123 NE 2d 713, it was held that where a coal company sells its coal at the mine in this State to a railroad company as purchaser, which handles it to points both in the State and out of the State, the coal becoming the property of the railroad for all practical purposes, when it was loaded into the cars of the railroad at the mine, the fact that some of the coal was consigned to and intended for use at destinations out of the State does not preclude the assessment of Retailers' Occupation Taxes based upon such sales. The Court further held that (p. 467) it cannot be contended that the Department of Revenue by its rules and regulations and its construction of the statute is

estopped from making a contention contrary thereto, as the rules and regulations of the Department and its construction of the statute, if erroneous, are not binding upon the Court, and do not operate as an estoppel against the State or to abrogate any of its rights.

## II.

## THE ILLINOIS USE TAX AS AUTHORATIVELY CONSTRUED BY THE ILLINOIS SUPREME COURT IN THIS CASE DOES NOT RESULT IN AN UNCONSTITUTIONAL TOLL UPON COMMERCE AMONG THE STATES NOR DOES IT RESULT IN MULTI-STATE TAXATION OF THE ACTIVITIES OF APPELLANT.

Appellees accept appellant's concession made before the Illinois Supreme Court that it would be subject to the tax, but resist its contention that the temporary storage provisions give it an exemption that entitled it to a tax-free pass. It is submitted, on the basis of its contention, that the only issue before the Illinois Supreme Court was whether the terms "use" and "consumption" were, under the Use Tax Act, synonymous. The Illinois Supreme Court was faced with a question of statutory construction, more specifically, a definition and interpretation of a legislative definition. The Retailers' Occupation Tax Act, Ill. Rev. Stat. 1961, Ch. 120, Sec. 440-453, was enacted in 1933 to fill emergency revenue needs growing out of the Depression. The Use Tax Act, Ill. Rev. Stat. 1961, Ch. 120, Sec. 439.1 et seq. is an important part of the composite picture of the legislature's intent to raise the basic revenues necessary to operate the various governmental departments of the State of Illinois. It became effective August 1, 1955, and was designed to be complementary to the Retailers' Occupation Tax Act. It was aimed at protecting the Retail-

ers' Occupation Tax base against being reduced by the out-of-state buying of tangible personal property by Illinois users from persons who do not engage in enough Illinois activity to be taxable under an Occupation Tax such as the Retailers' Occupation Tax. It was also aimed at protecting retailers who are liable for the Illinois Retailers' Occupation Tax against competition from those out-of-state retailers who would be beneficiaries of a favorable tax treatment in the absence of a complementary tax.

Appellees feel it is necessary to emphasize the legislative purpose and intention of the temporary storage provision. As appellant points out in its brief to the Illinois Supreme Court at page 27, that provision and the language introducing it read:

> " 'To prevent actual or likely multistate taxation, the tax herein imposed shall not apply to the use of tangible personal property in this State under the following circumstances:
>
> " '(d) the temporary storage, in this State, of tangible personal property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, is used solely outside this State . . .' "

As heretofore pointed out, there is no state in which either Shell Oil Company or United pays any so-called "Sales Tax" on the jet aviation fuel upon which the State of Illinois here attempts to impose a Use Tax. It is submitted that since the temporary storage provision is designed to prevent actual or likely multistate taxation, and since no taxation exists at all in fact, that this exemption does not have any application to the facts before this Court.

It is further submitted that it is not possible to consider and construe the provisions of the Use Tax Act without considering and construing the provisions of the

Retailers' Occupation Tax to which Act the Use Tax Act is complementary. (*Granite City Steel Co.* v. *Dept. of Revenue*, 30 Ill. 2d 552, 558, 198 NE 2d 507 (1964). To attempt to do so, as appellant does, is comparable to performing an autopsy on a missing body.

The Retailers' Occupation Tax Act has been the subject of a considerable volume of litigation and has been interpreted and re-interpreted by the Illinois Supreme Court in a multitude of cases. It is not the intention of appellees to chart the course of that court's long and torturously winding decisions concerning the proper construction and application of those revenue acts, but to call attention to one of the land-mark decisions in this field rendered by the Illinois Supreme Court in the case of *Modern Dairy Company* v. *Department of Revenue*, 413 Ill. 55, 108 NE 2d 8 (1952). In that case the court considered the proper construction in the Act with the original intent of the legislature as to the meaning of certain provisions of the Retailers' Occupational Tax Act. It is significant that that Act imposes a tax on "purchasers for use or consumption", whereas the Use Tax Act imposes a tax only on use. The *Modern Dairy Company* case, *supra*, recognizes and, in fact, establishes that it was the intent of the legislature to draw a distinction between the terms "use" and "consumption". As the Illinois Supreme Court said:

> "The legislature has the power to make any reasonable definition of the terms in a statute, and such definitions, for the purpose of the act, will be sustained. (*Smith* v. *Murphy*, 384 Ill. 34; *Krebs* v. *Thompson*, 387 Ill. 471; *Bohm* v. *State Employees' Retirement System*, 404 Ill. 117). Once the legislative intent is ascertained it should be given effect by the courts unless it is clearly in violation of some provision of the constitution, and captious and hypothetical rea-

soning should no longer be indulged. (*Foltz* v. *Davis*, 68 Fed. 2d 495.) When this court construes a statute and that construction is not interfered with by the legislature, it is presumed that such construction is in harmony with the legislative intent. (*Consumers Co.* v. *Industrial Com.*, 364 Ill. 145.) Conversely, if the legislature, after the courts construe the terms used in an act, attempts by amendment to define those terms as used in that act, the reasonable presumption is that the court's construction was not in accord with the original intent of the legislature. (*Domarek* v. *Bates Motor Transport Lines, Inc.*, 93 Fed. 2d 522; *In re Hurle*, 300 *Mass.* 223, 104 NE 336.) It would then seem incumbent upon the court to reconsider its construction of the act and, if it appeared to be clearly at variance with the interpretation of the legislature, to harmonize the court's construction with the legislative intent.

"In view of the original reason why the legislature adopted the phrase 'to purchasers for use or consumption', in consideration of the purpose and motive of the legislature in passing the Retailers' Occupation Tax Act, the apparent irrelevance of physical consumption to that motive and purpose, the unquestionable efforts of the legislature to correct the court's construction of the meaning of the terms, and the inconsistency of the court's construction of the meaning of the terms evidenced by the belabored decisions finding the purchaser the user or consumer when the purchases were admittedly actually consumed by another, we do not believe that the strict and narrow interpretation heretofore placed on these terms is in accord with the intention of the legislature, and are of the opinion it should no longer be applied.

"The title to this act describes sales 'to purchasers for use or consumption'. It is noted that the terms are in the disjunctive rather than the conjunctive, indicating that the legislature intended 'use' to mean

one thing and 'consumption' something else. Considering the purpose of the Retailers' Occupation Tax Act, it is reasonable to assume the legislature intended the term 'use' to include any employment of a thing which took it off the retail market so that it was no longer the object of a tax on the privilege of selling it at retail." (413 Ill. 55, at 66, 67)

Appellees submit that when the legislature enacted the complementary Use Tax Act, it was not unaware of the Illinois Supreme Court's decision in the *Modern Dairy Company* case, *supra,* in 1952, as the Use Tax Act, as noted above, was not enacted prior to and did not become effective until August, 1955. For the Illinois Court to have accepted appellant's position it would necessarily have had to assume that the legislature was unaware that there was a legal distinction between the meanings of the words "use" and "consumption". (*G. S. Lyons & Sons Lbr. & Mfg. Co.* v. *Dept. of Revenue,* 23 Ill. 2d 180, 177 NE 2d 316 (1961). Some objects of personal property are used by one generation after another and endure, such as precious metals, precious stones, furniture, machinery and homes. Other objects of tangible personal property by their nature are consumed by use, such as food, liquids and medicines. One cannot take a narrow, one-eyed view of when appellant uses its aviation fuel. The testimony in the record indicates that each of its 234 flights that take off from O'Hare Airport are fueled before taking off, and appellant concedes that in so loading the fuel aboard its aircraft, it exercises a right or power over tangible personal property incident to ownership of that property. Appellees insist that when said fuel is loaded on such aircraft it is irrevocably committed to its ultimate use.

Appellant, United, has conceded that Illinois has the authority to impose a tax upon the withdrawal of fuel from

temporary storage. Appellees cannot state it better than appellant did, where at page 62 of its brief to the Illinois Supreme Court, United stated:

> "Under United States Supreme Court decisions, Illinois has constitutional authority to define temporary storage of fuel, and withdrawal of fuel from temporary storage, as a taxable use, even though the fuel is ultimately used to propel vehicles or aircraft in interstate commerce. *Nashville, C. & St. L. Ry.* v. *Wallace,* 288 U. S. 249 (1933); *American Airways, Inc.* v. *Wallace,* 57 F. 2d 877 (M.D. Tenn. 1932), *aff'd* 287 U. S. 565 (1932); *Edelman* v. *Boeing Air Transport, Inc.,* 289 U.S. 249 (1933). These cases are very careful to emphasize that a tax upon storage, or upon withdrawal from storage, is permissible only because it falls short of a direct tax upon interstate commerce. *E. g. Nashville, C. & St. L. Ry.* v. *Wallace,* 288 U. S. 249, 268 (1933)."

At that point, however, appellant sought to establish that the legislature had not chosen to exercise its permissible taxing authority. To do that, United pointed its finger at the Department's Bulletin of June 3, 1963, and took the position that it was that Bulletin upon which appellees relied to establish taxability rather than relying upon the Use Tax itself. The authority to tax the transactions arises by virtue of the Use Tax Act and not by virtue of the Bulletin issued June 3, 1963, as appellant contended. Appellees contended, and the Illinois Supreme Court agreed, that the interpretation of June 3, 1963 was a correct interpretation of the Use Tax Act. The Use Tax Act states unequivocably that the exemption applies only where the tangible personal property "is used solely outside this State". The evidence demonstrated that the fuel withdrawn from storage and placed in the planes at O'Hare Airport was committed to "use" as defined by the Use Tax Act.

The statute makes no reference to any burn-off principle. The Illinois Court in imposing the Illinois Use Tax upon the appellant found its authority to make such an assessment in the language of the statute.

In *Edelman* v. *Boeing Air Transport, Inc.*, 289 U. S. 249, 250 (1933), this Court was faced with a factual situation indistinguishable from the instant case. In that case the State of Wyoming levied a use tax of four cents per gallon on all gasoline used or sold in the State of Wyoming. Respondent, Boeing, maintained airplane service for the transportation in interstate commerce of passengers, mail and express. It purchased gasoline both within and without the State which it intermingled and stored in tanks. It contended that the tax could not be applied to gasoline imported from without the State, stored in tanks at the airport and used for filling the tanks of airplanes which then consumed it. This Court stated:

> "* * * Issue is joined on the only question raised by the pleadings, whether the taxation of the gasoline which respondent withdraws from storage and uses for 'filling' its planes imposes an unconstitutional burden on interstate commerce. Hence we confine our decision to that question." 289 U. S. at 251.

In upholding the validity of the tax, the Court said:

> "As the statute has been administratively construed and applied, the tax is not levied upon the consumption of gasoline in furnishing motive power for respondent's interstate planes. The tax is applied to the stored gasoline as it is withdrawn from the storage tanks at the airport and placed in the planes. No tax is collected for gasoline consumed in respondent's planes either on coming into the state or on going out. *It is at the time of withdrawal alone that 'use' is measured for the purposes of the tax. The stored gasoline is deemed to be 'used' within the state and there-*

*fore subject to the tax, when it is withdrawn from the tanks.* Compare *Nashville, Chattanooga & St. Louis Ry.* v. *Wallace,* 288 U. S. 249, 53 S. Ct. 345, 350; 77 L. Ed. 730, decided February 6, 1933, *Gregg Dyeing Co.* v. *Query,* 286 U. S. 472, 52 S. Ct. 631, 76 L. Ed. 1232; *Hart Refineries* v. *Harmon,* 278 U. S. 499, 49 S. Ct. 188, 73 L. Ed. 475; *Bowman* v. *Continental Oil Co.,* 256 U. S. 642, 41 S. Ct. 606, 65 L. Ed. 1139.

"A state may validly tax the 'use' to which gasoline is put in withdrawing it from storage within the state, and placing it in the tanks of the planes, notwithstanding that its ultimate function is to generate motive power for carrying on interstate commerce. Such a tax cannot be distinguished from that considered and upheld in *Nashville, Chattanooga & St. Louis Ry.* v. *Wallace, supra.* There it was pointed out that 'there can be no valid objection to the taxation of the exercise of any right or power incident to * * * ownership of the gasoline, which falls short of a tax imposed directly on its use in interstate commerce, deemed forbidden in *Helson* v. *Kentucky, supra,* (279 U. S. 245, 49 S. Ct. 279, 73 L. Ed. 683).' As the exercise of the powers taxed, the storage and withdrawal from storage of the gasoline, was complete before interstate commerce began, it was held that the burden of the tax was too indirect and remote from the function of interstate commerce, to transgress constitutional limitations.

"Despite the fact that the statute as applied is identical in operation with that sustained in *Nashville, Chattanooga & St. Louis Ry.* v. *Wallace, supra,* respondent contends that as the statute is written, the tax is one on the consumption of gasoline in propelling its airplanes in interstate commerce, invalid under *Helson* v. *Kentucky, supra.* In that case a Kentucky statute taxing the use of gasoline was applied to that purchased and placed in the tanks of a ferryboat outside the state for use in operating it in interstate commerce. The tax, which was levied only with respect

to the gasoline consumed while the ferryboat was within the state, was held to be invalid as, in effect, a direct tax on the privilege of carrying on interstate commerce.

"But the officers of Wyoming, charged with the enforcement of the taxing statute, are giving no such application to it as was given to that in *Helson* v. *Kentucky, supra,* and it is not suggested that they will. All that has been done or threatened by them, under their interpretation of the statute, infringes no constitutional right of the complainant. In the circumstances, no case is presented, either by pleadings or proof, calling on a federal court of equity to rule upon the correctness of some other construction which may never be adopted by the state administrative officials or by the state courts." 289 U. S. at 251, 252, 253. (emphasis added)

Appellees found the argument of appellant in the court below confusing, if not downright contradictory. For example, at page 65 of its brief to the Illinois Supreme Court, in discussing the right of the State to tax the fuel it loads aboard its interstate flights, it says:

"The basis of such taxation is *not loading aboard the aircraft or consumption in interstate commerce,* but the event of statutory significance—termination of storage and use within Illinois. That is the only event that can sustain the use tax constitutionally, and only the quantity of fuel actually consumed within Illinois can meet this test."

It is submitted that consumption is not what Illinois taxes, but the use that occurs when the storage is terminated and the fuel is committed to its ultimate purpose. To accept the position of appellant, this Court would necessarily have to find that the words "use" and "consumption" are synonymous. The Illinois Supreme Court in its decision did not find these terms to be synonymous.

Appellees wish to emphasize to this Court part of the decision of the Illinois Supreme Court wherein it stated (App. B, p. 14, 15):

> "In language which we find to be plain, simple and unambiguous, the Act has granted exemption to 'the temporary storage, in this State, of tangible personal property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, *is used solely outside this State.*' (Emphasis added.) Exemption is thus granted only as to tangible personal property which is stored here temporarily and which, upon withdrawal from storage, is to be used solely outside Illinois. To put it another way, the legislature has stated that the temporary storage and the withdrawal therefrom are not taxable uses, if the property in question is t obe used solely outside the State. It is clear that if United was to withdraw its fuel from storage at Des Plaines and the airports and transport it outside the State for use elsewhere, as for example at an airport in nearby Wisconsin, the exemption would apply and neither the storage, nor the withdrawal, nor the transportation of the fuel outside the State would be uses subject to the tax. But United does not store in Illinois with any intention that the fuel will be used solely outside this State. Rather, the fuel is stored here only to facilitate United's operations from the O'Hare and Midway airports within the State. Under the circumstances, the 'storage' becomes something more than a 'temporary storage' for safekeeping prior to its use solely outside of Illinois. Such storage, under the plain words of the statute, does not qualify under the temporary storage exemption and, as the authorities already discussed reveal, either the storage itself or the withdrawal therefrom are uses which may be taxed without offending the commerce clause of the Federal constitution."

In reading appellant's Jurisdictional Statement, particularly pages 22 and 23, appellees are intrigued by the linguistic gyrations through which appellant seeks to remove its operations at O'Hare International Airport from its place of importance in its operations, but concedes that the millions of gallons of fuel involved in this case are imported into the State ". . . only for such period as is necessary to facilitate its interstate and foreign operations from the Chicago airports, . . ." It goes on to state that the fuel is loaded aboard United's aircraft in Chicago:

> "* * * Solely because of its geography, Chicago receives a huge volume of air service from United and other carriers not attributable to Chicago's own traffic. Much of this service is through traffic with no local aspect. For it, Chicago is merely a connecting link in a never-ending series of continuous interstate movements that begin and end outside of Illinois."

As appellees understand that argument, appellant's position is that it is not right to apply the holding and rationale in *Edelman* v. *Boeing Air Transport, Inc., supra,* to the facts before this Court because it is only a geographic accident that required appellant to use huge amounts of fuel aboard its aircraft, and that it is by mere accident Chicago is the hub of United's interstate system; but for this geographic accident, appellant argues, this case would be of little importance; it just doesn't seem right to permit Illinois to impose such a tax because United could not operate its system without having to load large amounts of fuel aboard its aircraft at Chicago because of this damnable geographic accident.

Appellant ignores the FAA requirement that any airplane departing from Chicago must carry a sufficient fuel

reserve to permit them to fly to airports beyond their intended destination and that is one of the primary reasons that planes landing in Chicago headed for further out-of-state destinations must refuel at Chicago.

## CONCLUSION

It is respectfully submitted that the Circuit Court of Cook County, State of Illinois, and the Illinois Supreme Court did not commit error in rejecting the contentions of United that it urges here upon this Court. The appellees respectfully pray that the Jurisdictional Statement of the appellant be dismissed and the decision of the Illinois Supreme Court be affirmed.

Respectfully submitted,

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## APPENDIX "A."

[Caption Omitted]

### OPINION OF TRIAL COURT

This suit was commenced by United Air Lines, Inc. to enjoin the assessment and collection of Illinois Use Tax measured by the amount of fuel owned by United and loaded in Illinois into fuel tanks of its aircrafts to propel them in interstate and foreign commerce.

In arriving at a decision in this case, which as far as I have been able to determine is without precedent in this State, or for that matter in any of the other States, I have been greatly aided by the excellent memorandum of authorities submitted by the attorneys for each of the parties.

The plaintiff contends and the proof establishes that all of this fuel is purchased from Shell Oil Company in the State of Indiana, and is transferred to storage facilities at or near O'Hare and Midway Airports for temporary storage and then loaded into the fuel tanks of the aircraft for use beyond the borders of the State of Illinois. With respect to the fuel designated for use in the planes operating out of O'Hare Field the fuel is transported by pipeline from either Hammond or East Chicago, Indiana, to a storage tank located in DesPlaines, Illinois, which is owned by Shell and leased jointly to United and American Airlines Company. From there it is then transferred by a series of pipelines to O'Hare Field and eventually pumped or placed in plaintiff's aircraft. With respect to Midway, the fuel is transferred by truck and placed in storage and ultimately placed in the planes.

Since the adoption of the Use Tax Act in 1955, until June, 1963, all common carriers were required to pay a tax only on that portion of the fuel actually consumed in the State of Illinois, which concept of liability under that Act has been designated in the trial of this matter as the "Burnoff theory."

On June 3, 1963, the then Director of Revenue, Theodore J. Issacs, ruled the Department's position to be that "tem-

porary storage ends and taxable use occurs when the fuel is taken out of storage facilities and placed in the tank of the airplane, railroad engine or truck. At this point the fuel is converted into its ultimate use, and therefore a taxable use occurs in Illinois." The announced purpose of the bulletin as stated therein was to "clarify the Department's position concerning the temporary storage provisions of the Use Tax Act and their relationship to fuel consumed by a common carrier."

It is this interpretation of the Use Tax Act which is attacked by the plaintiff.

Plaintiff contends that this interpretation is unauthorized by, and contrary to the Use Tax Act, and is violative of Article 2, Section 2; Article 4, Section 13; and Article 9, Section 1, of the Constitution of the State of Illinois; as well as Article 1, Section 8, Clause 3; Article 1, Section 10, Clause 2, of the Constitution of the United States, and the Fourteenth Amendment thereto.

As I understand the position of the plaintiff, it contends that none of the fuel placed in the tank of its planes in Illinois is consumed in Illinois. To support this, plaintiff submits that a regulation of the Civil Aeronautic Board requires that all planes arriving at Midway or O'Hare must carry reserve fuel sufficient to carry them to other airports such as Milwaukee, Detroit, Indianapolis, St. Louis, etc. in case they are not able to land at the local airports. By virtue of flying at an altitude in excess of 30,000 feet this fuel becomes extremely cold and when refueling takes place at local airports, the fuel is much warmer and consequently when injected into the plane rises to the top of the fuel tank. This results, plaintiff contends, in the cold fuel which was in the plane on its arrival, being used first, and which fuel, in all or practically all instances, is more than sufficient to propel the planes out of Illinois.

Plaintiff's evidence that higher temperature of fuel pumped into tanks of its planes upon their arrival in Illinois causes such fuel to flow through and rise above any colder fuel in those tanks corroborates the fact that such natural phenomenon results.

This evidence, however, does not permit this Court to then conclude that therefore none of the fuel pumped in Illinois into those tanks was consumed in propelling plaintiff's planes through the State of Illinois.

Plaintiff then contends that in any event, the Use Tax Act required it to pay that tax only on the amount of fuel consumed in Illinois. The law, however, is otherwise. The Supreme Court of this State has consistently stated that the tax is imposed on the *privilege* of use, not *on the extent of the use* of the privilege. It matters not how much of the fuel is consumed in Illinois. (Bode v. Barrett, 412 Ill. 204; Turner v. Wright, 11 Ill. 2d 161; Hicklin v. Coney, 290 U.S. 169.)

Further it appears from the statute and the law that the definition of "use" extends beyond actual "consumption" of tangible personal property. The statute defines use as follows: "Use means the exercise by any person of any right or power over tangible personal property incident to the ownership of that property." (Ch. 120, Par. 439.2, Ill. Rev. Stat.)

Unquestioned here is the fact that plaintiff owns the fuel that it causes to be stored in the storage tanks in Illinois, from which tanks it further causes such fuel to be withdrawn, then conveyed to the planes, and then pumped into the fuel tanks of those planes in Illinois.

Those facts clearly disclose that plaintiff does "exercise a right or power over tangible personal property (the fuel) incident to the ownership of that property" in Illinois. This

is the exact statutory definition of "use." The tax is properly imposed on the privilege of exercising such dominion. (Turner v. Wright, 11 Ill. 2d 161; Miller Brewing Co. v. Korshak, 35 Ill. 2d 86; Philco Corporation, et al., v. Department of Revenue, Doc. Nos. 40497, 40582, rehearing denied September 1968, not yet officially reported.)

It seems apparent that the facts in this case invoke tax consequence unless plaintiff is excluded by one of the exemptions in the Act. If plaintiff is excluded, it must be by virtue of Subparagraph (d) of Paragraph 439.33 which is as follows:

> (d) the temporary storage, in this State, of property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, is used solely outside this State or physically attached to or incorporated into other property that is used solely outside this State.

At first impression it appears that this provision might indeed exempt plaintiff from tax consequence on fuel which it proves is consumed solely outside the State of Illinois, even though plaintiff in Illinois exercises dominion over that fuel which constitutes the "use" under the Act invoking tax liability.

However, two reasons emerge why plaintiff is not entitled to this exemption.

First, plaintiff has not met the burden of proof the law requires. As stated previously, I cannot conclude from the evidence that *none* of the fuel placed in the tanks of its planes in Illinois was consumed here. In addition, many of the plaintiff's flights originate in Chicago, and the conclusion must be drawn that most, if not all, of these flights take on the bulk of their fuel here.

Second, in my opinion, the exemption intended to be granted by the Legislature is not available to the plaintiff.

As I read that exemption in the context of the purpose of the Act, and the applicable law, the exemption is restricted to that class of tangible personal property which enters the State of Illinois, temporarily rests here, then leaves to be sold or resold outside the State. The property *itself* must be capable of interstate mercantile transaction after it leaves Illinois. Plaintiff's fuel does not meet this test. Plaintiff itself consumes that fuel.

It is my opinion that the interpretation placed on the Act by the then Director of Revenue is authorized by, and in accord with that Act. Both the Act and the interpretation are proper and valid, and do not violate any of the State or Federal Constitutional provisions as claimed by the plaintiff. I so hold.

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## APPENDIX "B"

(No. 42042.—Judgment affirmed.)

UNITED AIR LINES, INC., Appellant, *vs.* GEORGE E. MAHIN *et al.*, Appellees.

*Opinion filed April 1, 1971.—Rehearing denied October 4, 1971.*

UNDERWOOD, C. J. *and* GOLDENHERSH, J., specially concurring.

KLUCZYNSKI, SCHAEFER and DAVIS, J.J., dissenting.

APPEAL from the Circuit Court of Cook County; the Hon. THOMAS C. DONOVAN, Judge, presiding.

PER CURIAM: United Air Lines, Inc., brought this action in the circuit court of Cook County to enjoin the Department of Revenue from assessing and collecting Illinois use tax on aviation fuel loaded at Chicago airports on planes of United which are about to embark upon, or to continue upon, interstate and foreign flights. Named as defendants

were appropriate State officials and United's supplier, the latter having the burden of collecting the tax. Judgment was for defendants and United has appealed, being joined by American Airlines, Braniff Airways and Northwest Airlines, to whom we have granted leave to file briefs as *amici curiae*.

The Use Tax Act, which went into effect in August, 1955, (Laws of 1955, p. 2027,) imposes a tax on the privilege of using in this State tangible personal property that was purchased elsewhere, and was designed to complement the Retailers' Occupation Tax Act, (Laws of 1933, p. 924), under which a tax is imposed upon persons engaged in the business of selling tangible personal property to purchasers for use and consumption. It has been found to be constitutional (*Turner* v. *Wright*, 11 Ill. 2d 161), and it is settled that the Use Tax Act was enacted for the valid purposes of preventing evasion of retailers' occupation tax by persons making out-of-state purchases of tangible personal property for use in Illinois, and of protecting Illinois merchants against diversion of business. At issue here, a matter of first impression, is the construction and application of that portion of section 3 of the Act which, from its inception in 1955, has provided for an exemption from the tax in these terms: "To prevent actual or likely multistate taxation, the tax herein imposed shall not apply to the use of tangible personal property in this State under the following circumstances: * * * (d) the temporary storage, in this State, of tangible personal property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, is used solely outside this State * * *." Ill. Rev. Stat. 1955, ch. 120, par. 439.3.

Conforming to a practice which has been essentially the same since May, 1953, United purchases and takes delivery of the aviation fuel in question from Shell Oil Company at

facilities of the latter located in Hammond and East Chicago, Indiana. Thereafter, United transports it by common carrier pipeline and trucks to its underground storage facilities at O'Hare and Midway airports in Illinois. Fuel transported by pipeline is first placed in storage tanks at Des Plaines, Illinois, and from there, as needed, is piped to the underground facilities. It remains in the latter only so long as necessary for certain purification processes, and from there is pumped into the tanks of United's aircraft, almost always immediately prior to departure time. United pays the tax on fuel used in intrastate flights, training flights and the like, and the dispute here relates only to fuel loaded on planes departing on interstate or foreign flights, United having 234 such flights each day. All of the aircraft involved must fly over specific routes prescribed by Federal aviation authorities, and thus the amounts of fuel consumed from the time the engines of the planes are started at the Illinois airports until they pass over Illinois borders can be determined with great accuracy.

From the record it appears that there were, and are, numerous common carriers, such as railroads, airlines and trucklines, which, like United, engaged in the practice of purchasing their fuel outside Illinois and storing it here prior to their use of it to propel equipment setting forth on interstate journeys. Immediately after the enactment of the Use Tax Act in 1955, the Department of Revenue uniformly and consistently interpreted and applied the Act to these carriers in such a manner that the incidence and measure of the tax was taken to be only that portion of the fuel consumed in or over Illinois. This construction has been commonly referred to as the "burn off" rule and, during the period of its application, provoked no amendatory legislation. Eight years later, on June 3, 1963, the Department abruptly changed its interpretation and issued a bulletin which announced:

"The Department's position is that temporary storage ends and a taxable use occurs when the fuel is taken out of storage and placed into the tanks of the airplanes, railroad engine or truck. At this point the fuel is converted into its ultimate use, and, therefore, a taxable use occurs in Illinois.

"If a common carrier does not have separate facilities for transferring the fuel out of the State of Illinois but always puts it into the tank of the airplane, railroad engine or truck for final consumption, then they no longer will be able to give a certificate to the vendor stating that the fuel is purchased within the temporary storage provisions of the Use Tax Act, but must pay the Use Tax to their supplier." In short, under this construction all fuel loaded on United's planes at the two airports was deemed to measure the tax, and the exemption in question was construed as having application only if the temporarily stored fuel is transported out of the state for use elsewhere by some means other than placing it in equipment which would consume it.

The present action, which for reasons not apparent in the record has been slow to progress, as soon initiated by United to enjoin the collection of the tax. In substance, it was the position of United that the new construction was erroneous and unreasonable, that the application of the Act as proposed contravenes the Illinois and Federal constitutions, and that it has no use tax liability incident to the fuel in controversy, or, alternatively, that it is liable only for tax measured by the amount of fuel burned in and over Illinois. The trial court rejected these contentions and United has renewed them here.

To support its contention that the "burn off" construction indulged in by the Department for 8 years should continue to prevail, United relies principally upon the rule of statutory construction that courts, in determining the proper construction of an ambiguous statute, will consider

and give weight to the contemporaneous construction placed upon a statute by the governmental officers or departments charged with the duty of administering it, and will usually adopt such contemporaneous construction where it is a reasonably permissible construction, has the implied assent of the legislature, and has been consistent, uniform and long continued. See: *People ex rel. Spiegel* v. *Lyons*, 1 Ill. 2d 409; *Illinois Bell Telephone Co.* v. *Illinois Commerce Com.*, 414 Ill. 275; *United States* v. *Leslie Salt Co.*, 350 U.S. 383, 100 L. Ed. 441, 76 S. Ct. 416; *Cory Corp.* v. *Sauber*, 363 U.S. 709, 4 L. Ed. 2d 1508, 80 S. Ct. 1331.) For reasons later to appear, we do not believe the statute is ambiguous; but even if ambiguity be assumed, the rule of construction relied upon cannot be employed in this case. As the rule itself recognizes, executive or administrative construction is not binding on the courts if it is erroneous (*P. H. Mallen Co.* v. *Department of Finance*, 372 Ill. 598; *Superior Coal Co.* v. *Department of Revenue*, 4 Ill. 2d 459), and in our opinion the "burn off" construction is constitutionally impermissible.

That construction of the statute, to repeat, measured the tax by the amounts of fuel consumed by United's planes in and over Illinois as they proceeded on their interstate journeys. And while it is difficult to see how such a construction could be derived from statutory language which grants exemption to temporarily stored property that is used "solely outside of this State," it is sufficient to say that the construction runs afoul of the commerce clause of the United States constitution. Decisive and binding authority for this conclusion is found in *Helson* v. *Kentucky* (1929), 279 U.S. 245, 73 L. Ed. 683, 49 S. Ct. 279, determined under facts which, in effect at least, cannot be distinguished from those of the present case. Involved there was an Ohio river ferry operated exclusively in interstate commerce between Kentucky and Illinois. Gasoline used to power the

ferry was purchased and delivered in Illinois, situs of the residence and business of the operator, and it was stipulated that "75 per cent of this gasoline was actually consumed within the limits of Kentucky, *but all of it in the making of interstate journeys.*" (279 U.S. at 248; emphasis added.) Issue arose when Kentucky sought to impose a tax on the gasoline consumed within its limits under a statute which, *inter alia,* authorized a tax on gasoline purchased "without the state" but used "within the state." Overruling Kentucky courts, the Supreme Court found under the circumstances that the gasoline was an instrumentality of interstate commerce, thus causing the tax to be "exacted as the price of the privilege of using an instrumentality of interstate commerce," (279 U.S. at 252), and struck it down as being an invasion of the exclusive power of Congress to regulate such commerce.

Our own statute must be held subject to the same infirmity when the amount of fuel consumed, or "burned off," within the limits of Illinois is made the incidence and measure of the use tax. All of the fuel over which controversy has arisen is consumed in the making of interstate journeys, and once the engines of a plane are started in Illinois, it can be said unequivocally that the fuel becomes an instrumentality of interstate commerce. Under the compulsion of *Helson,* to impose a tax based upon consumption within Illinois is to exact a tax on the privilege of using the fuel in interstate commerce. (*Cf. Shell Oil Co.* v. *State Board of Equalization,* 64 Cal. 2d 713, 414 P. 2d 820, 827; *Texas Gas Transmission Corp.* v. *Benson* (Tenn.), 444 S.W. 2d 137; *W. R. Grace & Co.* v. *Comptroller of the Treasurer,* 255 Md. 550, 258 A. 2d 740) And there is more here than was involved in *Helson.* United's planes pass over many States. They do not refuel in each State but fuel loaded here is necessarily used or consumed over and within each State. Should every State wherein fuel is consumed seek to impose a use tax

measured by the amounts of fuel consumed within its borders, an intolerable burden on interstate commerce would result. *Cf. United Air Lines, Inc.* v. *Illinois Commerce Com.*, 32 Ill. 2d 516.

Seeking to avoid the impact of *Helson*, United argues that the placing and presence of the fuel in departing planes is but a continuation of temporary storage; that the burning of fuel in and over Illinois is simultaneously consumption and the termination of temporary storage, and that the release from storage as the plane is operated in Illinois is a local event, or use, properly taxable by Illinois. Or, to put it another way, United asserts that all fuel placed in the tanks of its planes continues to be exempt under the temporary storage provision of our Act, and that the exemption is lost, and the fuel subject to the tax, only to the extent of the fuel released from the tanks for consumption in and over Illinois.

While we entertain grave doubts that *Helson* could be evaded by the fine distinction between "consumption" and "simultaneous consumption and termination from storage," and believe it probable that the fuel becomes an instrumentality of interstate commerce when it is loaded on a plane, the basic premise of the construction advanced is a faulty one. The placing and presence of the fuel in the tanks of aircraft may be "storage" in a special or technical sense, but we think it clear that the legislature did not intend for the temporary storage exemption to extend to "storage" of such nature. It is axiomatic that the words used in a statute should generally be given their plain and ordinary, or commonly accepted meaning, unless to do so would defeat the manifest intent of the legislature. (See: 34 I.L.P., Statutes, § 117.) Here the statutory references are to "the temporary storage, in this State," of tangible personal property, and to such property "stored here temporarily." The noun "storge" is specifically de-

fined as meaning "the act of depositing in a store or warehouse for safekeeping" and, consistent therewith, the verb "store" is defined as meaning "to deposit in a store or warehouse for safekeeping." (See: Webster's New Twentieth Century Dictionary, 2d ed., pp. 1795 and 1796; *Bandosz* v. *A. Daigger and Co.*, 255 Ill. App. 494, 499.) It may be observed, too, that such meanings are consistent with the legislative purpose of exempting only temporarily stored property used solely outside Illinois. Fuel is not placed or present in the tanks of an airplane for the purpose of safekeeping, and there is no rule of construction which permits a court to say that the legislature did not mean what the plain language of a statute imports. (*Western National Bank of Cicero* v. *Village of Kildeer,* 19 Ill. 2d 342.) Appropriate here, in light of United's effort to attribute a special or technical meaning to the language of the Act, is the observation in *People* v. *Day,* 321 Ill. 552, 555, which states: "What the framers of a statute would have done had it been in their minds that a case like the one here under consideration would arise is not the point to be considered. The inquiry is what, in fact, they did enact, probably without anticipating the existence of such facts." We conclude that the "burn off" construction was improper and that it cannot prevail as United insists.

Next to be determined is the proper construction of the temporary storage provision of the Act and, in relation thereto, the positions and arguments of the parties focus upon *Edelman* v. *Boeing Air Transport, Inc.* (1933), 289 U.S. 249, 77 L. Ed. 1155, 53 S. Ct. 591 In that case the State of Wyoming imposed a tax on all gasoline used or sold in the State. Boeing, which operated out of two airports within the State, maintained an air service for transporting passengers, mail and express in interstate commerce. It purchased gasoline both within and without the State which was intermingled and stored in tanks at the airports from

whence it was either sold or put into Boeing's own planes. Tax liability was admitted for the portions of the gasoline sold or used in intrastate flights, but, in apparent reliance on *Helson*, it was contended that the tax could not be validly applied to so much of the gasoline imported from outside the State as was loaded from the storage tanks into planes that consumed it in interstate flights. Rejecting this contention, the court said: "As the statute has been administratively construed and applied, the tax is not levied upon the consumption of gasoline in furnishing motive power for respondent's interstate planes. The tax is applied to the stored gasoline as it is withdrawn from the storage tanks at the airport and placed in the planes. No tax is collected for gasoline consumed in respondent's planes either on coming into the State or on going out. It is at the time of withdrawal alone that 'use' is measured for the purposes of the tax. The stored gasoline is deemed to be 'used' within the State and therefore subject to the tax, when it is withdrawn from the tanks. * * * A State may validly tax the 'use' to which gasoline is put in withdrawing it from storage within the State, and placing it in the tanks of the planes, notwithstanding that its ultimate function is to generate motive power for carrying on interstate commerce. Such a tax cannot be distinguished from that considered and upheld in *Nashville, Chattanooga & St. Louis Ry.* v. *Wallace, supra.* [288 U.S. 249.] There it was pointed out that 'there can be no valid objection to the taxation of the exercise of any right or power incident to * * * ownership of the gasoline which falls short of a tax directly imposed on its use in interstate commerce, deemed forbidden in *Helson* v. *Kentucky,* 279 U.S. 245. As the exercise of the powers taxed, the storage and withdrawal from storage of the gasoline, was complete before interstate commerce began, it was held that the burden of the tax was too indirect and remote from the function of interstate commerce, to transgress constitutional limitations." 289 U.S. at 251, 252.

Our own statute defines a taxable "use" as being "the exercise by any person of any right or power over tangible personal property incident to the ownership of such property" (Ill. Rev. Stats. 1961 and 1969, ch. 120, par. 439.2), and it is the contention of defendants that a taxable use occurs when United withdraws its fuel from storage and places it in its planes. United agrees that either storage (*Wallace,* 288 U.S. 249), or withdrawal from storage (*Edelman*), are the exercise of rights which might have been constitutionally taxed under our Act. It insists, however, that our legislature waived the right to tax either even when it enacted the temporary storage provision, and from this position argues that if the loading on the aircraft is intended as the taxable event, then the tax is constitutionally improper as being imposed upon an integral activity of interstate commerce. (*Cf. Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U.S. 157, 98 L. Ed. 583, 74 Ct. 396; *Puget Sound Stevedoring Co.* v. *Tax Com.,* 302 U.S. 90, 82 L. Ed. 68; *Joseph* v. *Carter & Weekes Stevedoring Co.,* 330 U.S. 422, 91 L. Ed. 993; *Richfield Oil Corp.* v. *State Board of Equalization,* 329 U.S. 69, 91 L. Ed. 80.) But both parties, in our view, oversimplify the problem by failing to consider the specific language of the Act, which we are bound to construe so that all of its provisions are given effective meaning. *People ex rel. Barrett* v. *Barrett,* 31 Ill. 2d 360; *Pliakos* v. *Liquor Control Com.,* 11 Ill. 2d 456.

In language which we find to be plain, simple and unambiguous, the Act has granted exemption to "the temporary storage, in this State, of tangible personal property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, *is used solely outside this State.*" (Emphasis added.) Exemption is thus granted only as to tangible personal property which is stored here temporarily and which, upon withdrawal from storage, is to be used solely outside Illinois.

To put it another way, the legislature has stated that the temporary storage and the withdrawal therefrom are not taxable uses, if the property in question is to be used solely outside the State. It is clear that if United was to withdraw its fuel from storage at Des Plaines and the airports and transport it outside the State for use elsewhere, as for example at an airport in nearby Wisconsin, the exemption would apply and neither the storage, nor the withdrawal, nor the transportation of the fuel outside the State would be uses subject to the tax. But United does not store in Illinois with any intention that the fuel will be used solely outside this State. Rather, the fuel is stored here only to facilitate United's operations from the O'Hare and Midway airports within the State. Under the circumstances, the "storage" becomes something more than a "temporary storage" for safekeeping prior to its use solely outside of Illinois. Such storage, under the plain words of the statute, does not qualify under the temporary storage exemption and, as the authorities already discussed reveal, either the storage itself or the withdrawal therefrom are uses which may be taxed without offending the commerce clause of the Federal constitution.

Contention is next made that the Department, in applying the tax, has done so in such a manner as to violate the provision of section 1 of article IX of the Illinois constitution which requires taxation to be "uniform as to the class upon which it operates." However, there is no proof in this record that there has been a lack of uniformity or discrimination within the class of taxpayers affected, and as a consequence there is nothing which permits us to determine the issue sought to be raised. It may be added, too, that this contention is erroneously premised on a theory that the fuel stored by United is eligible for the protection of the temporary storage exemption, and that the tax has been laid on either the withdrawal of the fuel from storage or

its transportation outside the State. In either event, the constitutional claim made must be found to be without merit.

For the reasons stated, the judgment of the circuit court of Cook County is affirmed.

*Judgment affirmed.*

Mr. Chief Justice Underwood specially concurring:

I agree that Illinois may constitutionally collect the tax imposed in this case on all of the fuel loaded on United's planes at the airports. I am, however, not at all certain that application of the "burn off" rule would, as the opinion indicates, be constitutionally impermissible if the statute so provides. In my opinion the statute does not so provide, but rather clearly exempts the fuel in question here only when "used solely outside this State". I do not consider discussion of the "burn off" rule necessary to the decision, and would affirm on what I consider to be the plain meaning of the statutory language.

Mr. Justice Goldenhersh joins in this concurrence.

Mr. Justice Kluczynski, dissenting:

I disagree with the majority's conclusion that the interpretation of section 3 of the Use Tax Act (Ill. Rev. Stat. 1955, ch. 120, par. 439.3) as originally given by the Department of Revenue was erroneous and that such an interpretation would be violative of the commerce clause.

The events of storing fuel in Illinois or the taking of fuel from storage in Illinois are constitutionally taxable under our Act because the events are complete before interstate commerce begins. (*Nashville, Chattanooga & St. Louis Railway* v. *Wallace*, 288 U.S. 249, 77 L. Ed. 730, 53 S. Ct. 345; *Edelman* v. *Boeing Air Transport, Inc.*, 289 U.S. 249, 77 L. Ed. 1155, 53 S. Ct. 591.) Thus a tax measured by the value of the entire tank of fuel is constitu-

tionally permissible and it follows that a tax measured by something less would also be permissible.

Section 3 of the Act in part provides: "To prevent actual or likely multistate taxation, the tax herein imposed shall not apply to the use of tangible personal property in this State under the following circumstances: * * * (d) the temporary storage, in this State, of tangible personal property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, is used solely outside this State * * *." (Ill. Rev. Stat. 1955, ch. 120, par. 439.3.) I believe that this section exempts that portion of the fuel which "stored here temporarily, is used solely outside this State." The intent of the owner when the fuel is placed in the tanks of the airplane is that a certain portion will be consumed in the State of Illinois. This portion is no longer exempt under section 3 and therefore taxable. The remainder of the fuel is stored in the tanks for use solely outside the State of Illinois and keeps its exempt status while in the tanks.

Such an interpretation was given to the exemption from its enactment in 1955 until June 3, 1963, when the Department of Revenue changed its position so that a tax, measured by the value of the entire tank of fuel, is imposed when fuel is taken out of a storage tank and placed into tanks of the airplane. I believe, however, that the original construction given to the statute is correct for the following reasons: First, it is a reasonable construction of the wording of the exemption which admittedly is capable of other reasonable interpretations when applied to the facts of this case.

Secondly, the construction given to the statute at the time of enactment by the agency administering the statute is entitled to substantial weight. Before the Governor signed the Use Tax Act in July, 1955, the Department of

Revenue, in response to an inquiry by the Honorable Paul Randolph (member of Illinois House of Representatives, Chairman of the Revenue Committee of the House and member of the joint House-Senate Conference Committee which recommended the Use Tax Bill for passage) stated in a letter to him its intent as to how it would administer the Act. The letter was written on July 12, 1955, by Willard Ice, then Supervisor, Rules and Regulations Division of the Department of Revenue, and stated that if a carrier purchased fuel outside of the State "and some of the items or units thereof (such as so many gallons of gasoline) are used in Illinois and some of the items or units thereof (such as so many gallons of gasoline) are used outside of Illinois, the carrier would be liable for the use tax on the items used in Illinois, but not on the items used outside of Illinois assuming that the carrier keeps adequate records to segregate the non-taxable from the taxable items."

Thirdly, the exemption as originally construed, had been applied continuously and uniformly for an extended period of time. And finally, during the eight years when the Department's original construction was in effect, the Illinois legislature amended section 3 of the Use Tax Act, at least once each session without repudiating the Department's construction. Thus, the legislature gave implied consent to the construction by nonaction on its part. See: *Canada Packers, Ltd.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 385 U.S. 182, 17 L. Ed. 2d 281, 87 S. Ct. 359; *Cory Corp.* v. *Sauber*, 363 U.S. 709, 4 L. Ed. 1508, 8 S. Ct. 1331; *United States* v. *Leslie Salt Co.*, 350 U.S. 383, 100 L. Ed. 441, 76 S. Ct. 416; *People ex rel. Spiegel* v. *Lyons*, 1 Ill. 2d 409; *Illinois Bell Telephone Co.* v. *Commerce Com.*, 414 Ill. 275.

For these reasons I would reverse the judgment of the circuit court of Cook County.

Schaefer and Davis, J. J., join in this dissent.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

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**No. 71-862**

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UNITED AIR LINES, INC.,
*Appellant,*

*vs.*

GEORGE E. MAHIN, et al.,
*Appellees.*

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## ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

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## BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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Pursuant to Rule 16.4 of the Rules of the Supreme Court of the United States, appellant United Air Lines, Inc. ("United") files this brief in opposition to appellees' Motion to Affirm the judgment of the Supreme Court of Illinois.

## INTRODUCTORY STATEMENT

The appellees' discussion of the "Issues Presented" (Motion to Affirm, pp. 2-5, hereinafter "Motion") concentrates on the issues of statutory construction which have been authoritatively decided by the Illinois Supreme Court. Indeed, most of their Motion (pp. 6-8, 13, 17-21, 25-26) is devoted to discussing these issues. Their purpose for this approach is obscure.

It cannot be the belief that United has waived the constitutional issues because the record is clear and appellees in fact concede that these were presented and adjudicated below (Motion, p. 4, App. 2, 5, 8, 10-14).

It cannot be that the statutory construction by the Illinois Supreme Court disposed of the case in such a way that there remain no constitutional issues. The Illinois Use Tax Act, as construed by the Illinois Supreme Court, places the incidence of the Illinois use tax on the loading of fuel aboard United's aircraft immediately prior to the commencement of interstate and foreign journeys. This squarely creates the question, raised by United in its Jurisdictional Statement, whether such a tax offends the Commerce Clause.

In addition to that constitutional issue, there is the subordinate one whether *Helson and Randolph* v. *Kentucky*, 279 U.S. 245 (1929), precludes Illinois from taxing only that portion of the fuel loaded at Chicago by United which is consumed in Illinois. On this latter issue, the Illinois Supreme Court is split among the two *per curiam* judges who believed that *Helson* precluded taxation of Illinois-laden fuel measured by the amount burned over Illinois, the two concurring judges who were not sure, and the three dissenting judges who concluded that the burn-off rule did not violate the Commerce Clause.

Coordinate with the appellees' misplaced attention with the already decided statutory issues is their scant response to the constitutional issues raised in United's Jurisdictional Statement. Although their Motion does discuss the *Helson* case and *Edelman* v. *Boeing Air Transport*, 289 U.S. 249 (1933), the appellees make no attempt to distinguish the numerous cases of this Court cited as controlling authorities by United in its Jurisdictional Statement (*e.g.*, pp. 12-14, 16-18, 20-22).

## SPECIFIC ISSUES RAISED BY THE MOTION TO AFFIRM

1. What is labeled by appellees as an "Additional Statement of Fact" (Motion, pp. 8-12) can be better characterized as an argument based on inference and innuendo rather than upon the uncontroverted facts in the record. Appellees speak of the creation of "the appearance of a sale of fuel taking place in Indiana" (*id.*, p. 9). Before trial, however, appellees stipulated that title, delivery and risk of loss to all the fuel in question passed to United in Indiana. Based on that stipulation and additional evidence introduced by United at trial, the Trial Court specifically found that the "proof establishes that all [of the fuel] is purchased from Shell Oil Company in the State of Indiana" (Jurisdictional Statement, App. 1). Although this finding was not the subject of a cross-appeal by appellees to the Illinois Supreme Court, they did raise the factual issue of where the fuel was purchased in their brief and arguments before that Court. That Court, in turn, explicitly adopted the finding of the Trial Court on this factual issue (Jurisdictional Statement, App. 6-7).

In their factual summary, appellees fail to mention that it is impossible for Shell to deliver aviation fuel to the Chicago area airports except through its terminal in northern Indiana, which serves several midwestern States. That terminal has performed the same function for Shell since 1928, and United has taken delivery of aviation fuel at that terminal for the Chicago (and other Midwest) airports since 1953, two years prior to the passage of the Illinois Use Tax Act.*

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* Appellees' statement (Motion, p. 10) that "[i]t would be physically possible for Shell to deliver the fuel . . . at O'Hare Airport" may be misleading. Shell's private pipeline from its Wood River refinery terminates at its Hammond, Indiana storage facilities. For Shell to deliver the fuel to United at O'Hare and Midway airports would require Shell to use the facilities of common carriers between its northern Indiana terminal and those airports, just as United now does.

2. Appellees rely principally upon *Edelman* v. *Boeing Air Transport*, 289 U.S. 249 (1933), and assert that that case is indistinguishable from the instant one (Motion, pp. 23-25). As United noted in its Jurisdictional Statement (pp. 14-15), *Edelman* and certain related cases, all decided in the mid-30's, are fundamentally different from the present case, because in all of them the legal incidence of the state tax was explicitly upon the storage of fuel or upon its withdrawal from storage or upon both events.* In the present case, in contrast, the incidence of the tax cannot fall upon the storage of fuel or its withdrawal from storage because, according to the decision below, the critical event under the Illinois use tax is the placing of the fuel into a tank of an airplane, railroad engine or truck after its withdrawal from statutorily-exempt storage. Under the temporary storage provision of the Use Tax Act, as construed by the Illinois Supreme Court, if the fuel is placed in another type of tank or pipeline and is transported from the State "neither the storage, nor the withdrawal, nor the transportation of the fuel outside the State would be uses subject to the tax." (*Per curiam* opinion, Jurisdictional Statement, App. 15.)** It is *only* if the fuel is placed in the tanks of aircraft and other vehicles about to depart in interstate journeys that the use tax is triggered. Thus, the "practical operation" or "operating incidence of the tax" (*American Oil Co.* v. *Neill*, 380 U.S. 451, 455 (1965)), actually falls upon the loading of the fuel into

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* Appellees clearly recognize that the incidence of the tax in *Edelman* was upon the withdrawal of the fuel from storage. This is evident from the emphasis they added to their quotation from the *Edelman* case on pages 23-24 of their Motion.

** The argument by appellees (Motion, p. 15) that United withdraws its fuel from storage at least twice prior to loading it aboard its aircraft is obfuscatory. Under the Illinois Supreme Court's opinion such "withdrawals" are a continuation of exempt storage because the fuel is not placed in "equipment which would consume it" (Jurisdictional Statement, App. 8).

the tanks of United's aircraft, a point which appellees apparently concede.*

Since the incidence of the Illinois use tax falls upon the act of loading the fuel aboard United's aircraft, rather than upon the storage of the fuel or its withdrawal from storage, the *Edelman* case and its progeny are inapposite in the instant situation. Rather, as discussed at length in United's Jurisdictional Statement (pp. 12-15), the present case is controlled by such later decisions of this Court as *Michigan-Wisconsin Pipeline Co.* v. *Calvert*, 347 U.S. 157, 166-69 (1954), the Stevedoring Cases, and *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69 (1946). See also *Spector Motor Service* v. *O'Connor*, 340 U.S. 602 (1951) (invalidating a privilege tax** in the form of franchise tax upon a corporation engaged in interstate commerce). As previously noted, appellees make no effort whatsoever to distinguish any of these more recent precedents of this Court set forth in United's Jurisdictional Statement.

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* On page 21 of their Motion, the appellees state:

". . . appellant concedes that in . . . loading the fuel aboard its aircraft, it exercises a right or power over tangible personal property incident to ownership of that property. Appellees insist that *when said fuel is loaded on such aircraft* it is irrevocably committed to its ultimate use." (Emphasis added.)

Similarly, *id.*, at p. 22, they state "[t]he evidence demonstrated that the fuel withdrawn from storage and placed in the planes at O'Hare Airport was committed to 'use' as defined by the Use Tax Act". And *id.*, at 25, "[i]t is submitted that consumption [of the fuel over Illinois by the departing flight] is not what Illinois taxes, but the use that occurs when the storage is terminated and the fuel is committed to its ultimate purpose." In the context of this argument, "ultimate purpose" means loading of the fuel into the tanks of United's aircraft immediately prior to their interstate and foreign departures.

** As noted in the Jurisdictional Statement (p. 4), the Illinois use tax is likewise a privilege tax. *Turner* v. *Wright*, 11 Ill.2d 161, 164-65, 142 N.E.2d 84, 86-87 (1957).

3. Appellees apparently take the position that the Illinois use tax may constitutionally be imposed upon all of the fuel loaded in Chicago because, so their argument goes, there is no multistate taxation of the fuel (Motion, p. 18). Appellees' contention is factually and legally erroneous.

The fuel loaded by United in Chicago will be subject to multiple state taxation if the decision of the Illinois Supreme Court is affirmed. The record shows that the purchase of the fuel by United in Indiana is subject to the Indiana gross income tax (Jurisdictional Statement, p. 6). Like the Illinois use tax, the Indiana gross income tax is a privilege tax. *Adams Mfg. Co.* v. *Storen*, 304 U.S. 307, 311 (1938); *Gross Income Tax Division* v. *Bartlett*, 228 Ind. 505, 93 N.E.2d 174, 177 (1950); *Indiana Creosoting Co.* v. *McNutt*, 210 Ind. 656, 5 N.E.2d 310, 313 (1936). The Indiana tax is measured by the gross receipts of sales (Burns Ind. Stat. Ann. tit. 64, ch. 26, § 64-2601(m) (1971 Supp.)), which is the measure identical to that of the Illinois use tax. While the legal incidence of the Indiana tax is, in the first instance, upon the seller, Indiana law permits parties by contract to shift the burden of the tax to the purchaser. See *Herlihy Mid-Continent Co.* v. *Northern Indiana Public Service Co.*, 245 F.2d 440, 443 (1957). This is precisely what has occurred in the instant case where the fuel purchase contract between Shell and United specifically requires United to pay the Indiana tax as a separate item.

Moreover, regardless of legal incidence, the Indiana tax arises from the sale of the fuel from Shell to United which commences the interstate movement of it to the Chicago airports, where it rests only for as long as is necessary for purification and United's operational needs, before it continues its interstate journey in the tanks of aircraft.*

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* This Court has frequently struck down privilege taxes imposed upon activities that are a part of interstate commerce (*E.g.*, *Spector Motor Service* v. *O'Connor*, 340 U.S. 602 (1951); *State Tax Comm'n*

Appellees obscure the issue of multiple taxation when they note that the Indiana tax is not a sales or use tax, as is the Illinois tax. It is not surprising that appellees cite no authority supporting this distinction, because the prohibition of the Commerce Clause against multiple state taxation has never been construed to require that the state taxes be the same or similar. Even so, regardless of labels, it is clear that both the Illinois and Indiana taxes are in substance the same—privilege taxes which are measured by the same gross receipts. Thus, if the Illinois use tax is sustained in its present unapportioned application to all fuel loaded in Illinois, United will be subject to direct, unapportioned multiple state taxation which has been consistently prohibited by this Court. See *Gwin, White & Prince* v. *Henneford*, 305 U.S. 434, 438-440 (1939) and cases cited therein; *Adams Mfg. Co.* v. *Storen*, 304 U.S. 307, 311 (1938);* cases cited in Jurisdictional Statement, pp. 20-22.

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v. *Interstate Natural Gas Co.*, 284 U.S. 41 (1931); *Ozark Pipe Line Corp.* v. *Monier*, 266 U.S. 555 (1925)), particularly where the tax imposed was not apportioned in accordance with the taxpayer's activities in the state. *E.g., Gwin, White & Prince* v. *Henneford*, 305 U.S. 434, 438-440 (1939) and cases cited therein.

* In *Adams Mfg Co.*, this Court invalidated the very Indiana gross income tax for which United bears the burden in the present case on the ground that, as applied to interstate sales, the tax raised the specter of potential multiple interstate taxation. This Court reasoned as follows:

> "The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure *without apportionment*, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may *in substance* be laid to the fullest extent by States in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids." 304 U.S. at 311. (Emphasis added.)

To the same effect, also striking down the Indiana gross income tax as applied to interstate sales, see *Freeman* v. *Hewit*, 329 U.S. 249 (1946).

## CONCLUSION

For all of the foregoing reasons, United requests this Court to deny the appellees' Motion to Affirm, and, because of the substantial constitutional questions presented, to note probable jurisdiction and grant plenary review of the instant case.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971.

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**No. 71-862**

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UNITED AIR LINES, INC.,

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*Appellees.*

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ON APPEAL FROM THE SUPREME COURT OF ILLINOIS.

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## BRIEF AS AMICI CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENT.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971.

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UNITED AIR LINES, INC.,

*Appellant,*

*vs.*

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*Appellees.*

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS.

## BRIEF AS AMICI CURIAE OF AMERICAN AIRLINES, INC., BRANIFF AIRWAYS, INCORPORATED, and NORTHWEST AIRLINES, INC. IN SUPPORT OF JURISDICTIONAL STATEMENT OF UNITED AIR LINES, INC.

This brief is presented with the consent of the parties in this case. Copies of letters from the attorneys for the parties have been filed with the Clerk.

The airlines filing this statement as *amici curiae* support United Air Lines' appeal. They have large tax claims on file with the Illinois Department of Revenue awaiting the outcome of this litigation. American's claims for use taxes on airplane fuel for a six-year period exceed more than $2,400,000, Braniff's more than $88,000, and Northwest's more than $700,000. As these figures show, Illinois is the

center of major air transportation systems of the country. These airlines wish to emphasize that the Illinois Supreme Court's 4-to-3 decision is not a mere matter of statutory construction and will, if not reversed, validate a serious interference with interstate transportation.

In 1955 the Illinois legislature, in enacting the Illinois Use Tax Act (*Laws of 1955*, pp. 2027-9), used careful language to avoid even a slight burden on interstate commerce that might violate the United States Constitution. The statute exempted certain uses in order "to prevent actual or likely multistate taxation" [§ 3, par. 6, clauses (a)-(d); Ill. Rev. Stat. 1969, ch. 120, § 439.31]. Clause (b) of § 3 expressly exempted the use of "rolling stock moving in interstate commerce". Clause (d) exempted property bought outside the state, "stored here temporarily", and later "used solely outside this State". The Department of Revenue ruled, immediately and correctly, that clause (d) exempted airplane fuel bought outside Illinois, stored here temporarily, and loaded on planes in Illinois for interstate journeys except as the fuel was consumed in the engines ("burned off") within Illinois. This result created no problems of constitutionality. Its application was easy because the airlines regularly keep records of the distances flown in Illinois. It fulfilled the Illinois legislature's aim of avoiding the danger of unconstitutionality involved in "actual or likely multistate taxation".

But in 1963 the Illinois Department of Revenue disrupted this reasonable solution. On June 3, 1963 the Department's Director issued a bulletin which construed the statute to tax *all fuel loaded on planes in Illinois* regardless of where the fuel is consumed. Such a tax is of course much greater than one on fuel consumed in Illinois, because planes must often load up in Chicago with enough fuel for flights to either sea coast or even to another continent. The 1963

bulletin declared that "temporary storage ends and a taxable use occurs when the fuel is taken out of storage facilities and is placed into the tank of the airplane".

Years of litigation over the Department's 1963 bulletin have now resulted in the 4-to-3 decision appealed from, which rejects the Department's 1955 construction and sustains that of 1963. But this appeal does not seek review of the misconstruction of the meaning of the statute. Review is sought because the construction of the statute by the Illinois Supreme Court majority imposes a direct and unconstitutional tax on interstate commerce, as shown by the three opinions.

The *per curiam* opinion (App. 5-16) uses constitutional invalidity to destroy the Department's 1955 "burn-off" construction, which is claimed to violate the commerce clause. The invalidity is traced to *Helson* v. *Kentucky*, 279 U. S. 245 (1929), which held that Kentucky could not tax gasoline loaded on a ferryboat in Illinois and consumed within Kentucky. Here the *per curiam* opinion misconstrues the *Helson* holding to reach the anomalous result, as stressed in the Jurisdictional Statement of United Air Lines (p. 17), that the taxation of all the fuel loaded in the planes in Chicago is deemed less of a burden on interstate commerce than merely taxing that part of the fuel that is actually consumed in Illinois.

When the *per curiam* opinion comes to construe the language of the temporary storage exemption (App. 14-5), it gives one uncommon example of its application, i.e., to stored fuel that is moved from an Illinois airport to a Wisconsin airport (as by pipeline or tank vehicle). Under this construction the exemption never applies to, and the tax is always imposed on or measured by, the fuel loaded on the plane for an interstate journey. Thus the impact of the use tax is solely on the loading for an interstate flight.

The incidence of the tax on loading is also revealed expressly in the special concurring opinion of two justices, who describe the tax as "imposed on all of the fuel loaded on United's planes at the airports" (App. 16).

The dissenting opinion (App. 16-8) of three justices (Justices Kluczynski, Schaefer, and Davis) explains that the Department's *1955 construction* did not violate the commerce clause and is (1) a reasonable construction (2) given to the statute by the agency administering it in 1955-1963 and (3) impliedly consented to by the legislature during that period. Understandably the dissenting opinion does not discuss the commerce clause validity of the *1963 construction* which the dissenters rejected.

The event of loading fuel for an interstate journey, which the Illinois Supreme Court majority makes the incidence of the tax, is an integral part of interstate commerce under settled decisions of this Court. *Puget Sound Stevedoring Company* v. *Tax Commission*, 302 U. S. 90 (1937); *Joseph* v. *Carter and Weekes Stevedoring Company*, 330 U. S. 422 (1947); *Michigan-Wisconsin Pipeline Company* v. *Calvert*, 347 U. S. 157 (1954). The commerce clause holding in *Edelman* v. *Boeing Air Transport*, 289 U. S. 249 (1933), decided in the early days of commercial air transportation and relied on in the *per curiam* opinion, is inapplicable here. In addition to the distinctions explained in United's Jurisdictional Statement, we note that the lower court *Edelman* opinions (51 F. 2d 130; 61 F. 2d 319) show that the proceeds of the Wyoming airplane fuel tax there sustained were devoted to state airport facilities used by the taxpayer. Here the Illinois use tax has no such application.

The *per curiam* and special concurring opinions are based on misconceptions of the commerce clause that affect the Illinois Supreme Court majority's construction of the statute. The majority does not share the concern for con-

stitutional limitations manifested in the statute which the legislature artfully worded to avoid a tax on interstate transportation. The *per curiam* opinion confuses basic constitutional distinctions and reaches anomalous results that are very detrimental to airline operations.

The Jurisdictional Statement of United Air Lines demonstrates fully how the Illinois Use Tax statute, as construed by the decision appealed from, imposes a heavy toll on the fuel consumed in interstate transportation and is an unconstitutional burden on interstate commerce under many decisions of this Court.

We strongly urge this Court to review the appealed decision in order to clarify the power of the State of Illinois to tax the fuel used in nation-wide transportation systems. The questions involved are of substantial, national importance.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-862

UNITED AIR LINES, INC.,

*Appellant,*

*vs.*

GEORGE E. MAHIN, et al.,

*Appellees.*

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

## BRIEF FOR APPELLANT

### OPINIONS BELOW

The opinion of the Supreme Court of the State of Illinois is reported at 49 Ill.2d 45, 273 N.E.2d 585 (1971), and is reproduced in the Appendix at page 193. The unreported opinion of the Trial Court, the Circuit Court of Cook County, is reproduced in the Appendix at page 185.

### JURISDICTION

The judgment of the Supreme Court of Illinois was entered on April 1, 1971, and a timely petition for rehearing was denied by the Illinois Supreme Court on October 4, 1971. A notice of appeal was filed in that Court on December 20, 1971. A Jurisdictional Statement was filed

in this Court on January 3, 1972, asserting jurisdiction in this Court to review on appeal the judgment of the Illinois Supreme Court on the basis of Title 28, United States Code, Section 1257(2). This Court noted probable jurisdiction on March 20, 1972.

## STATUTE INVOLVED

Ill. Rev. Stat., 1961 to 1971, ch. 120, § 439.3:

"A tax is imposed upon the privilege of using in this State tangible personal property purchased at retail from a retailer. Such tax is at the rate . . . of 4% of the selling price of such property . . . .

* * *

"To prevent actual or likely multistate taxation, the tax herein imposed does not apply to the use of tangible personal property in this State under the following circumstances:

* * *

"(d) the temporary storage, in this State, of tangible personal property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, is used solely outside this State . . . ."

* * *

## CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Art. I, § 8, cl. 3:

"The Congress shall have Power* * *

"[3] To regulate Commerce with foreign Nations, and among the several States. . . ."

United States Constitution, Amend. XIV, § 1:

". . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## QUESTIONS PRESENTED

I. Whether the judgment of the Illinois Supreme Court applying a use tax to all fuel loaded by United aboard its interstate and foreign flights departing from Illinois violates the Commerce and Due Process Clauses.

A. Does the imposition of the Illinois Use Tax on the *act of loading* fuel aboard aircraft about to depart from Illinois on interstate and foreign flights constitute an unconstitutional burden on interstate commerce?

B. Does the Illinois use tax unconstitutionally burden interstate commerce if it is based upon the mere *intention* of United to use the fuel temporarily stored in Chicago to facilitate its interstate operations?

C. Does the application of the Illinois use tax to all of the fuel loaded aboard United's interstate flights departing Illinois result in multiple state taxation of that fuel in violation of the Commerce Clause, and bear any relationship to services provided by the State as required by the Due Process Clause?

D. Does the imposition by Illinois of a use tax on all fuel loaded aboard United's interstate and foreign flights departing from Chicago constitute a toll upon interstate commerce in contravention of the fundamental purposes of the Commerce Clause—where all of the fuel is purchased outside Illinois, rests in Illinois only for such period as is necessary for the support of United's interstate operations, and except for insignificant amounts is actually consumed outside Illinois?

II. In the alternative, whether Illinois can tax at most only that portion of the fuel loaded in Illinois that is actually consumed in Illinois?

## STATEMENT OF THE CASE

This suit was initially brought by United in the Circuit Court of Cook County, Illinois to enjoin the Illinois Department of Revenue from assessing Illinois use tax, imposed by Ill. Rev. Stat., 1961 to 1971, ch. 120, §§ 439.1 *et seq.*, on all aviation fuel loaded aboard United's interstate and foreign flights departing from Chicago. All the fuel in issue is purchased by and delivered to United outside Illinois, and is temporarily stored in Illinois by United solely for the needs of its interstate and foreign operations. Nearly all of the fuel is actually consumed outside of Illinois by United's flights departing that State.* In its Amended Complaint (App. 1**) United contended, *inter alia*, that the application of the Illinois use tax to any of the fuel so loaded, would violate the Commerce Clause, Article I, § 8, cl. 3, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. In the alternative, United urged that, under those constitutional prescripts, the tax could be applied to, at most, only that portion of the Illinois-laden fuel actually burned over Illinois. The Circuit Court of Cook County rejected both arguments. The Illinois Supreme Court affirmed by a 4-3 vote, holding, among other things, that the application of the use tax to all the fuel loaded in Chicago by United did not violate the Commerce Clause.

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* None of the fuel at issue in this case is used on intrastate flights.

** The "App." references are to the Appendix filed with this brief.

## Statutory Background

### Illinois Use Tax Act

The Illinois use tax (Ill. Rev. Stat., 1961 to 1971, ch. 120, §§ 439.1 *et seq.*) is a privilege tax* currently imposed at a rate of 4% of the selling price on the use in Illinois of tangible personal property purchased at retail. Although "use" is broadly defined (*id.*, § 439.2) to mean " . . . the exercise [in Illinois] . . . of any right or power over tangible personal property incident to the ownership of that property . . . ", the statute contains several exceptions intended "to prevent actual or likely multistate taxation" (*id.*, § 439.3 (6th unnumbered paragraph)). One of these is the "temporary storage provision" which excludes from use tax property purchased outside of Illinois, temporarily stored in the State, and used solely outside the State (*ibid.*).**

The Illinois Use Tax Act specifies that the tax is to be paid into the State's General Revenue Fund, and then expended three-fourths generally from that Fund and one-fourth transferred to the Common School Fund (*id.* § 439.9).***

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* *Id.*, at § 439.3. See *Turner* v. *Wright*, 11 Ill.2d 161, 164-165, 142 N.E.2d 84, 86-87 (1957).

** Except for rate changes the relevant provisions of the statute have remained unchanged since the original enactment of the Use Tax Act in 1955. Illinois Laws, 1955, p. 2027.

*** Ill. Rev. Stat. ch. 120, § 439.9 (20th unnumbered paragraph) provides as follows:

> "Of the moneys received by the Department under [the Use Tax] Act, after October 31, 1969, ¾ thereof shall be paid into the State Treasury, and ¼ shall be reserved in a special account and used only for the transfer from the General Revenue Fund in accordance with Section 8½ of 'An Act in relation to State finance,' approved June 10, 1919, as amended."

This ratio has varied from time to time.

## Chicago Airport Ordinances

The municipal ordinances of the City of Chicago require that the fees charged to the commercial airlines, such as United, and other users of O'Hare and Midway Airports, constitute full compensation for the use of the hangars, cargo buildings, terminal fuel system facilities, in addition to the runways, ramp and landing rights.* Moreover, the bond issues which financed O'Hare, the principal Chicago airport, require such fees to cover not only operating and maintenance expenses, but to be sufficient to amortize the bond indebtedness which financed that airport.**

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* "No person shall use the airport facilities at Chicago Midway Airport or Chicago-O'Hare International Airport for operation of aircraft, including non-commercial private aircraft, without paying compensation for the use of such facilities in accordance with the following schedule of rates, except to the extent that a contract with the City covering part or all of the operation is in effect specifying a different rate." Municipal Code of Chicago, § 37-11, as amended, January 1, 1971.

** The 1959 Bond Ordinance provides in pertinent part as follows:

"The City covenants that prior to the issuance of the Chicago-O'Hare International Airport Revenue Bonds authorized by this Ordinance, it will fix and place in effect rents, fees, rates and other charges for the use of the Airport including any services rendered by the City in the operation thereof, and an initial schedule of fees, rates and other charges that from time to time will be adjusted, in order that the Revenues of the Airport will be sufficient at all times to meet the following under the provisions of this Article: (a) to provide funds for the payment of the cost of operation and maintenance; (b) to provide for making required deposits to the credit of the Interest Account; (c) to provide for making required deposits to the credit of the Debt Service Reserve Account; (d) to provide for making required deposits to the credit of the Sinking Fund Account; (e) to provide for making required deposits to the credit of the Reserve Maintenance Account; and (f) to provide for making required de-

**Burn-Off Rule**

From 1955, when the Illinois use tax was enacted, until 1963, the temporary storage exception was consistently construed by the Illinois Department of Revenue to apply to fuel purchased outside Illinois by common carriers and temporarily stored by them in the State, so that only that portion of the fuel loaded aboard departing flights (or surface vehicles) that was actually burned in Illinois was subject to the use tax. This interpretation was known as the "burn-off" rule. In 1963, without any change of statute or intervening court decision, the Department repudiated the burn-off rule by a Bulletin that provided in part (App. 23):

> "... temporary storage ends and a taxable use occurs when the fuel is taken out of storage facilities and is *placed into the tank of the airplane,* railroad engine or truck. *At this point, the fuel is converted into its ultimate use,* and, therefore, a taxable use occurs in Illinois.
>
> "If a common carrier does not have separate facilities for transferring the fuel out of the State of Illinois but always puts it into the tank of the airplane, railroad engine or truck for final consumption, ... they no longer will be able to give a certificate ... stating that the fuel is purchased within the temporary storage provisions of the Use Tax Act, but must pay the use tax. ..." (Emphasis added.)

United contended in the lower courts, *inter alia,* that the imposition of the tax on the placing or loading of the fuel

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posits to the credit of the Emergency Reserve Account. ..." Ordinance Authorizing Chicago-O'Hare International Airport Revenue Bonds Series of 1959, Article V, Section 5.01 (adopted December 29, 1958).

Under the 1959 Bond Ordinance, $120,000,000 in airport revenue bonds were issued on January 1, 1959. Subsequent bonds were issued under supplementary ordinances in 1961, 1962, 1967, 1968, and 1970, all of which incorporated by reference the basic 1959 Ordinance.

into the tanks of aircraft departing on interstate and foreign journeys would create a direct burden on interstate commerce in violation of the Commerce Clause, and that such tax would also violate the Due Process Clause of the Fourteenth Amendment. In the alternative, United took the position that only the portion of the Illinois-laden fuel actually consumed within the State by the departing aircraft constitutionally could be subjected to Illinois use tax.

## Decision Below

By a 4 to 3 vote, the Illinois Supreme Court upheld the position of the Department of Revenue's Bulletin that the fuel was "converted into its ultimate use" when it was placed into the tanks of the aircraft, and held that a tax was due on all the fuel so loaded aboard United's interstate and foreign flights about to depart from Chicago.

The principal (*per curiam*) opinion, in which two justices fully joined, states explicitly that if the fuel were taken from the State "by some means other than placing it in equipment which would consume it" (App. 195), the temporary storage exemption would extend not merely to stationary storage on the ground, but also to its loading aboard transportation vehicles such as tank trucks or railroad tank cars, and to its transportation from the State. (App. 202.) The rationale for this conclusion is that unless the means of removing the property from the State is included within the scope of the temporary storage provision, it would be a nullity. Since there is no tax if the fuel is withdrawn from storage and taken from the State by other means, it is clear that neither the storage nor the removal from storage is what makes the fuel taxable. This leaves the act of loading the fuel into the fuel tanks of the aircraft as the taxable event—that is, the tax is imposed on the actual loading of the aircraft which commits the fuel to interstate commerce.

The *per curiam* opinion supplements this analysis by the statement that United was not entitled to the temporary exemption because (App. 202):

> "... United does not store in Illinois with any intention that the fuel will be used solely outside this State.[*] Rather, the fuel is *stored here only to facilitate United's [interstate] operations from the O'Hare and Midway airports within the State.* Under the circumstances, the 'storage' becomes something more than a 'temporary storage' for safekeeping prior to its use solely outside of Illinois." (Emphasis added.)

The opinion concludes that application of the tax to all the fuel loaded aboard interstate and foreign flights does not violate the Commerce Clause.

The *per curiam* opinion reached the result it did on the basis of two preliminary conclusions: (i) that the imposition of the tax according to the "burn-off" rule, by which only Illinois-laden fuel actually burned in Illinois is subject to use tax, was prohibited as a burden on interstate commerce by this Court's decision in *Helson and Randolph* v. *Kentucky*, 279 U.S. 245 (1929), and (ii) that *Edelman* v. *Boeing Air Transport*, 289 U.S. 249 (1933), permits the taxation of all fuel stored and loaded in Illinois even though it is consumed by interstate flights. This pair of conclusions produces the anomalous result that a tax on *all* the fuel loaded is deemed less of a burden on interstate commerce than a tax on only the *portion* of such Illinois-laden fuel actually consumed in Illinois.

Although United strenuously asserted that the fuel purchased by United in Indiana and loaded in Illinois was being subjected both to Indiana gross income tax and Illinois

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* What the reference to United's intention means is not clear, since United knew, and therefore intended, that almost all of the fuel would be consumed outside of Illinois.

use tax, the *per curiam* opinion does not allude to the question of multiple state taxation in its constitutional analysis.

In a short separate opinion, the two concurring justices expressed uncertainty as to whether the burn-off rule was "constitutionally impermissible," but found it unnecessary to answer that question. They affirmed on the basis of "the plain meaning of the statutory language," and agreed (App. 203) with the *per curiam* opinion that:

> "Illinois may constitutionally collect the tax imposed in this case on all of the fuel loaded on United's planes at the airports."

They, too, ignored the issue of multiple State taxation.

Justices Kluczynski, Schaefer and Davis, dissenting (App. 203), disagreed with the conclusion that the burn-off rules was barred by the *Helson* case; they went on to conclude that the burn-off rule was the correct construction of the Illinois statute (an issue not before this Court). (App. 204-205.)

## Summary of Facts

### Purchase, Delivery and Handling of the Fuel

All the aviation fuel involved in this case is purchased from the Shell Oil Company by United in Indiana, and is delivered to United at Shell's depots in Hammond and East Chicago, Indiana. (Stipulation, ¶ 6, App. 38; Illinois Supreme Court Opinion, App. 194; Trial Court Opinion, App. 185-186). All purchases are subject to the Indiana gross income tax, currently at a rate of ½% of the purchase price,* which, pursuant to contract with Shell, United

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* Burns Ind. Stat. Ann. tit. 64, ch. 26, §§ 64-2601 to 64-2603. The rate of this tax has varied since the outset of this case, June 1963, from ⅜% to ½%.

is obligated to pay.* The fuel is then transported by common carriers to O'Hare and Midway airports in Chicago where it is stored only for such time as is necessary for certain purification processes and United's operating needs. (Stipulation, ¶¶ 7-8, App. 38; Tr.** 335-336, App. 169-170.) All of the fuel is pumped into United's aircraft fuel tanks, almost always immediately prior to the aircraft's departure on interstate or foreign flights. (Stipulation, ¶¶ 7, 8, App. 38; Tr. 42-45, 70-71, App. 61-64, 73-74.) United has handled its fuel purchasing and loading arrangements in essentially the same manner since May, 1953 (Illinois Supreme Court Opinion, App. 194), *two years prior* to the enactment of the Illinois Use Tax Act. (Tr. 309, 350-351, App. 161, 174-175.)

### Consumption of the Fuel

At trial United introduced detailed and uncontroverted evidence that very little of the fuel loaded aboard its aircraft at O'Hare and Midway airports are burned in or over Illinois, and such as is burned, is consumed on only about 3.7% of United's departing flights. These conclusions derive from a combination of facts.

1. United is able to determine with precision the amount of fuel, including ground taxi fuel, each of its aircraft

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* From July 1, 1963, through December 31, 1967, the amount of Indiana tax paid by United amounted to approximately $403,000, and approximately $150,000 for 1968. (Tr. 154-155, App. 102.) The Indiana gross income tax remains in effect, and the fuel purchased in Indiana by United continues to be subject to it.

While the legal incidence of the Indiana tax is, in the first instance, upon the seller, Indiana law permits parties by contract to shift the burden of the tax to the purchaser. *Herlihy Mid-Continent Co.* v. *Northern Indiana Pub. Service Co.*, 245 F.2d 440, 443 (7 Cir. 1957).

** The "Tr." references are to the Report of Proceedings before the trial court which are contained in the official record.

burns from the moment its engines are started until it crosses the Illinois border departing from the State.* (Tr. 106-107, App. 86-87; UA Ex. 24, App. 236, Tr. 107.)

2. Under FAA Regulations, all of United's flights must be planned so as to arrive at their destination with large amounts of reserve fuel on board. United uniformly requires that all its aircraft carry supplementary reserves approximately 50% in excess of those specified by the FAA; these supplementary reserves are in turn approved by the FAA. To illustrate, the FAA and combined reserves

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* United's flight patterns and use of fuel are rigidly controlled by the Federal Aviation Agency, pursuant to the authority granted in the Federal Aviation Act, 49 U.S.C. §§ 1301 *et seq.*

The FAA requires commercial aircraft to operate over specifically defined departure routes leading them out of the State and to their destination. (Stipulation, ¶ 3, App. 35-37; Tr. 79-81, 87, App. 76-77, 80; UA Ex. 20, App. 233, Tr. 104.) These departure routes, from which, for safety and operational reasons, only immaterial deviation is permitted, can be thought of as "aerial highways." They perform the same function as surface highways, and almost all of United's flights follow the same departure routes day after day. (Tr. 80-84, App. 76-78.)

United's aircraft are flown in accordance with standard procedures promulgated by United and approved by the FAA. (Stipulation, ¶ 3, App. 35-37; Tr. 101-03, App. 83-84; UA Ex. 23, App. 235, Tr. 122.) These procedures specify the engine power settings to be used in all phases of flight, including takeoff, climb and cruise, for each type of aircraft. (Tr. 88-90, App. 81-82). United maintains current data for each of its aircraft types showing fuel consumption at each power setting. (Stipulation, ¶ 3, App. 35-37; Tr. 105-106, App. 86-87.) It also maintains current records of fuel consumed during ground taxi time at the Chicago airports for each type of aircraft. (Tr. 106-107, App. 86-87.) Either by calculation of fuel consumption or by fuel gauge readings, United can determine the exact fuel consumption over Illinois of all its flights departing Illinois.

for a 3-engine Boeing 727 are 5,400 and 8,100 pounds, and for a 4-engine Douglas DC-8 are 8,000 and 12,000 pounds (UA Ex. 25, App. 237, Tr. 115). In addition, when there is a threat of bad weather at the scheduled destination, FAA Regulations require aircraft to carry fuel sufficient to arrive at the intended destination, plus additional fuel sufficient to fly to a specified alternate airport and land there with reserves on board equal to those normally required for the original destination. The most commonly used alternate airports for Chicago are Milwaukee, Detroit, Minneapolis-St. Paul, Cleveland and Omaha, which require additional reserves ranging from 6,000 to 18,000 pounds for a DC-8. (Stipulation, ¶ 10, App. 39-40.) Many of these flights do not go to the alternate airport, but land at their scheduled destination with this extra fuel on board.

As a result of these safety requirements, all of United's aircraft arriving at Chicago land with very substantial amounts of unused fuel in their fuel storage tanks.* Two surveys, utilizing actual fuel gauge readings for more than 18,000 flights during 1963 and 1967, show that (UA Exs. 20, 21, 27, App. 233, 234, 240, Tr. 104, 100, 120):

(a) every flight lands in Chicago with sufficient fuel on board to take it beyond the borders of Illinois on the FAA route *actually assigned* to that aircraft on its departure from Illinois (Stipulation, ¶ 11, App. 40); and

(b) 99.97% of the flights land in Chicago with, on the average, from 1.9 to 7 times as much fuel as would be required to depart from Illinois over any routes

* A survey of over 13,500 United flights landing in Chicago in 1967 disclosed that 100% of them landed with the FAA-required fuel reserves, and 99.6% landed with the higher (FAA-approved) United fuel reserves. (UA Ex. 26, App. 238-239, Tr. 118.)

regularly assigned to United by the FAA, as follows:

| Routes* | Miles in Illinois | Percentage of United Flights Using | Ratio of Landed Fuel to Fuel Needed in Illinois for Departure Route | |
|---|---|---|---|---|
| | | | All Aircraft | 727's** |
| 6 East<br>1 North<br>1 Northwest | 63 or less | 64.30% | From 3.4 to 7.0 times | From 4.2 to 5.4 times |
| 3 West | 116 to 131 | 32.00% | 2.4–3.5 | 3.0–3.1 |
| 2 West | 176 and 207 | 3.67% | 1.9–2.8 | 2.4–2.6 |
| 1 West*** | 265 | 0.03% | 1.7–2.2 | 2.2 |
| | | 100.00% | | |

3. The fuel on board United flights landing in Chicago is extremely chilled because of the low temperatures encountered during high altitude flight. (Tr. 173, App. 110-111.) In contrast, the temperature of the fuel loaded in Chicago is at approximately the local surface air temperature. The year-round temperature differential between the landed fuel and the fuel loaded in Chicago ranges between 45° to 50° F. This results in a significant difference in the specific gravity of the two quantities, and thereby causes stratification of the colder from the warmer fuel, with the cold landed fuel forming a distinct layer at the bottom of the aircraft storage tanks. (Tr. 173-177, App. 110-114.) Since all fuel consumed during flight is pumped to the engines from the bottom of these tanks, the cold bottom layer of landed fuel is burned first. (Tr. 179-182, App. 114-117.) (Trial Court opinion, App. 187.)

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* The departure routes can be identified on the map of Illinois (UA Ex. 20, App. 233, Tr. 104) and on the related table (UA Ex. 21, App. 234, Tr. 100).

** The Boeing 727 performed slightly more than 50% of the 18,000 flights surveyed.

*** This route is used as a "safety valve" during extreme weather conditions. (Tr. 86-87, App. 79-80.)

There is some intermixing of the newly-loaded fuel with the cold landed fuel at the time of fueling. This mixing is not uniform through the tank, but is primarily confined to the upper portion of the cold fuel and the lower portion of the warmer fuel. The lower portion of the cold fuel remains basically unmixed at the bottom of the aircraft tanks. (Tr. 176, 181-182, App. 112-113, 115-117.)

The fact that the intermixing does not appreciably affect the cold fuel at the bottom of the tank is particularly significant in light of the fact that the cold landed fuel, as a weighted average, equals the amount of fuel loaded in Chicago—i.e., it averages about 50% of the total fuel on board at takeoff. (Stipulation, Appendix 2, App. 43).

If it is assumed that only half (¼ of the takeoff fuel) of the cold landed fuel remains unmixed at the bottom of the tanks, reference to the chart on page 14 above discloses that no departing flights (except the .03% using the safety-valve west route) consume in Illinois more than *de minimis* amounts of Illinois-laden fuel. If a more conservative estimate is made that only 40% (1/5 of the takeoff fuel) of the landed fuel remains unmixed, only 3.7% of the departures consume more than *de minimis* amounts of Illinois-laden fuel while in the State. For this conclusion to apply to only the 64.30% of the flights that depart to the East and North, only 1/3 to 1/7 of cold fuel need be unmixed.

4. Because of the reserve fuel safety requirements, previously mentioned, each United flight departing from Chicago loads substantial amounts of excess fuel which is intended to and does remain in storage throughout the flight and is on board when the flight lands at its destination. This fuel will not be used until later flights beyond that destination. This can be typically illustrated by reference to over 9,000 departures from Chicago by Boeing 727's during the 1963 and 1967 surveys (which comprise over half

of the departures of those surveys). The combined FAA and United fuel reserve for this aircraft is 8,100 pounds.* On the average, these flights loaded 15,300 pounds in Chicago, so that more than half of the fuel loaded was for reserve purposes, and would be on board the departing flight when it landed in another State.**

### Interstate Operations

The evidence shows that United is an instrumentality of interstate commerce, fully regulated by several agencies of the Federal Government. United operates its flights pursuant to Certificates of Public Convenience and Necessity issued by the Civil Aeronautics Board ("CAB"), its schedules must be filed with the CAB and the United States Postal Service, its aircraft must be flown according to comprehensive procedures established by the FAA, and it is obligated, weather and equipment permitting, to perform all flights as scheduled. To meet its schedules, and perform its contracts with passengers and shippers, United must load large quantities of fuel in Illinois and transport that fuel outside the State on interstate and foreign flights. As already mentioned, a significant portion of such fuel is burned after the departing planes have landed in another State and are proceeding on the next and subsequent legs of their journey. (Stipulation, ¶¶ 1-3, 5, 9-12, App. 33-37, 39-41.)

These facts, however, give only a superficial indication of the non-local nature of United's operations at and through O'Hare and Midway Airports. While only 5.4% of

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* As indicated by the footnote on page 13, these reserves will be on board at landing in virtually all instances.

** Actually, 8,100 pounds is an understatement as an average reserve figure because it excludes the additional bad weather reserves previously explained.

United's system's passengers are enplaned in Chicago, 28.5% are part of its Chicago traffic, of which 62%* are carried through Chicago by through or connecting flights. (Tr. 41, App. 61; UA Ex. 8, App. 231, Tr. 39.)

Of its 234 departures per day from Chicago (Tr. 42, App. 61), 73% are through flights averaging only 45 minutes on the ground, and 19% are "short turn-arounds" averaging one hour and 52 minutes in Chicago.** (Tr. 42, 44-45, App. 61-63; UA Ex. 9, App. 232, Tr. 47.) Of United's CAB authorized route system of 17,420 unduplicated miles, only 256 route miles (1.5%) are within Illinois. (Stipulation, ¶ 2, App. 34.) By contrast, more than 13% of its daily flights take off from Chicago (Tr. 42, App. 61), and 16.5% of all of the fuel used by United is loaded in Chicago. (See Tr. 358-360, App. 176-177.)

Because of its geographical location, Chicago receives a substantial volume of air service, from United and from other carriers, that it would not otherwise receive. (Tr. 33-35, App. 56-58.) Most of this "excess" service is through traffic with no local aspect. For it, Chicago is a connecting link in a continuous interstate movement that both begins and ends outside Illinois. The Chicago airports' role for this traffic is merely to enable passengers to transfer from one flight to another, on or between lines, and to load fuel and supplies aboard the aircraft while it is on the ground no longer than is necessary to have these functions performed. (Tr. 45-47, App. 63-64.)

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* This figure is understated because it misses passengers transferring flights in Chicago who do not hold continuation tickets. (Cf. Tr. 37-38, App. 59.)

** A "short turn-around" occurs when an aircraft terminates one flight in Chicago and promptly takes off as another flight. (Tr. 43, App. 62.) The remaining 8% stay overnight in Chicago for scheduling purposes. (See Tr. 42, App. 61; UA Ex. 9, App. 232, Tr. 47.)

## SUMMARY OF THE ARGUMENT

I.A. The Illinois use tax, as applied to the act of loading fuel aboard United's aircraft in Chicago, constitutes a direct unconstitutional burden upon interstate commerce, in violation of the controlling decisions of this Court, because the State of Illinois is seeking to exact a privilege tax for engaging in an activity that is an integral part of interstate commerce which cannot be the subject of a state privilege tax.

I.B. Moreover, if the principal (*per curiam*) opinion of the Illinois Supreme Court is read literally to mean that United is to be denied the usual benefits of the temporary storage provision *solely because* the fuel in question is stored in Illinois to facilitate United's interstate operations, then the lower court has overtly discriminated against interstate commerce. In effect, it is conditioning United's entitlement to a state statutory exemption upon the requirement that it refrain from storing fuel in Illinois to support its interstate operations from that State.

I.C. The Illinois Use Tax Act, as applied to all the fuel loaded aboard United's aircraft in Chicago, also contravenes the Commerce Clause because it results in multiple state taxation of the fuel, the purchase of which by United is subject to the Indiana gross income tax. Moreover, the taxation of all of the fuel loaded in Chicago by United bears no reasonable relationship to—and does not purport to have any relationship to—the services or protection that United and other carriers may receive from the State of Illinois, as required by the Due Process Clause.

D. Taxation of the entire amount of the fuel loaded in Chicago not only is an unconstitutional burden upon interstate commerce for the specific reasons outlined under A, B and C above, but it also constitutes a toll upon interstate

commerce in derogation of the very purpose of the Commerce Clause. By applying its use tax to all fuel loaded by interstate flights departing Chicago, even though none is purchased in Illinois, and very little of such fuel is used or consumed in the State, Illinois is attempting to exploit its location as the hub of the nation's air (and surface) transportation system to impose a toll on the passage of commerce through it. The amount of the tax sought bears no reasonable relationship to the protection and services rendered to that commerce by that State.

II. As an alternative to the contention that Illinois cannot impose use tax on any fuel loaded aboard interstate and foreign flights, United suggests that, at most, Illinois may be constitutionally entitled to tax that portion of the fuel *stored and actually burned* in the State. By misconstruing prior decisions of this Court, the Illinois Supreme Court concluded that taxing only the fuel burned in Illinois offends the Commerce Clause. This created the incongruous result that taxing *all* of the fuel loaded in Illinois is deemed less of a burden on interstate commerce than taxing, under the burn-off rule, only that portion of the fuel which is actually burned in Illinois.

## ARGUMENT

### I. The Judgment of the Illinois Supreme Court Applying a Use Tax to All Fuel Loaded by United Aboard Its Interstate and Foreign Flights Departing from Illinois Violates the Commerce and Due Process Clauses.

#### A. The Imposition of the Illinois Use Tax on the Act of Loading Fuel Aboard Aircraft About to Depart from Illinois on Interstate and Foreign Flights Constitutes an Unconstitutional Burden on Interstate Commerce.

The Illinois use tax, as authoritatively construed by the Illinois Supreme Court, is imposed upon the act of loading fuel into United's planes immediately prior to the commencement of their interstate and foreign journeys from Illinois.* That this is the taxable event is evident both from the scope of the Illinois temporary storage exemption and from the reasoning of the Illinois Court.**

Inasmuch as Illinois seeks to tax all the fuel stored and loaded in Chicago, there are only three events that occur in the State applicable to *all* the fuel which could be the basis of such taxation: storage, withdrawal from storage, or

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* See generally pages 8-10, *supra*.

** It is a fundamental principle of constitutional law that the validity of a state exaction depends on "the practical operation of the tax, that is, substance rather than form." *American Oil Co.* v. *Neill*, 380 U.S. 451, 455 (1965). This approach requires the court to look behind the State's own characterization or justification of the charge and ascertain its actual "operating incidence." *Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435, 444 (1940). The court must determine the "ultimate effect of the law as applied and enforced." *American Oil Co.* v. *Neill*, 380 U.S. 451, 455 (1965); see *Connecticut Gen. Life Ins. Co.* v. *Johnson*, 303 U.S. 77, 80 (1938). As this Court stated in *Spector Motor Service, Inc.* v. *O'Connor*, 340 U.S. 602, 608 (1951), "[i]t is not a matter of labels. The incidence of the tax provides the answer."

loading aboard the aircraft.* It is neither the temporary ground storage of the fuel nor its withdrawal from such storage because, according to the Illinois Court's reasoning, what occurs after such withdrawal is decisive as to whether the tax is imposed. The *per curiam* opinion is explicit in stating that, if after withdrawal the fuel were transported from Chicago to Milwaukee in a tank truck for use at the Milwaukee airport, no tax would be due. (App. 202.) It follows that, under the Illinois Court's decision, the taxable event is, and can only be, the act of loading it aboard United's aircraft in Illinois preparatory to their interstate journeys. As thus interpreted, the Illinois use tax is imposed on an integral and inseparable component of the interstate transportation process.

Numerous cases decided by this Court support the principle that an integral aspect of interstate commerce may not be subjected to state taxation. A leading case, similar to the instant one, which the Illinois Supreme Court failed to follow, is *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157 (1954). There Texas claimed that the transfer of gas from a refinery pipeline to an interstate line was sufficient to trigger a severance tax at the moment the fuel passed from one line to the other. As described in Mr. Justice Clark's unanimous opinion for the Court, "the taxable incidence is the taking of gas from the outlet of an independent gasoline plant within the State for the purpose of immediate interstate transmission." 347 U.S. at 161. In holding that the tax, as applied by the State to the transmission of the gas in interstate commerce, would result in an

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* The tax is not on the burning of the fuel because the Illinois Court concluded that *Helson and Randolph* v. *Kentucky*, *supra*, prohibits taxation of consumption of the fuel on interstate flights. (App. 196-197.) Moreover, only a fraction of the fuel is consumed in Illinois.

unconstitutional direct burden on interstate commerce, this Court stated (347 U.S. at 166):

> "It is now well settled that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it. *Memphis Natural Gas Co.* v. *Stone*, 335 U.S. 80, 87 (1948); *Western Live Stock* v. *Bureau of Revenue*, [303 U.S. 250] at 258."

The Court then described in detail the intimate relationship between the activity sought to be taxed and interstate commerce, and it did so in language equally applicable to the instant case (347 U.S. at 167-168):

> "[R]eceipt of the gas in the pipeline is more than its 'taking'; *from a practical standpoint it is its 'taking off' in appellants' carrier into commerce; in reality the tax is, therefore, on the exit of the gas from the State.* This economic process is inherently unsusceptible of division into a distant local activity capable of forming the basis for the tax imposed, on the one hand, and a separate movement in commerce, on the other. It is difficult to conceive of a factual situation where the incidence of taking or loading for transmission is more closely related to the transmission itself. This Court has held that much less integrated activity is 'so closely related to interstate transportation as to be practically a part of it' [quoting, *Baltimore & Ohio S. W. R. Co.* v. *Burtch*, 263 U.S. 540, 544 (1924) (loading or unloading of a shipment)]." (Emphasis added.)

Concluding that all taxable local activities had been completed prior to the occurrence of the alleged taxable event, this Court held that (*id.*, at 169):

> "... as a basis for finding a separate local activity, the incidence [of the tax] must be a more substantial economic factor than the movement of the gas from a

local outlet of one owner into the connecting interstate pipeline of another."

During the same Term, this Court was confronted in *Railway Express Agency* v. *Virginia*, 347 U.S. 359 (1954), with an attempt by the State to impose a privilege tax measured by gross receipts, as is the Illinois use tax, upon the interstate activities of the Railway Express Agency. The State contended that three incidents of the Agency's activities were sufficiently localized to sustain the imposition of the tax, namely, the local pickup of parcels, the delivery of parcels within the State, and the movement of parcels through the State. This Court rejected the contention that the State had the power to tax such so-called "local incidents," holding specifically that "local incidents such as gathering up or putting down interstate commodities as an integral part of their interstate movement are not adequate grounds for a state license, privilege or occupation tax." 347 U.S. at 368 (citations omitted).

So, also, in *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U.S. 90, 92-94 (1937)* and *Joseph* v. *Carter & Weeks Stevedoring Co.*, 330 U.S. 422, 427, 433-434 (1947), this Court held that a State could not impose a gross receipts tax upon the loading or unloading of interstate vessels because those activities were so integrally related to interstate commerce that no separate local taxable event could be identified to sustain the imposition of the tax.

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* In the *Puget Sound* case, this Court held that "[t]he business of loading and unloading being interstate or foreign commerce, the State of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts. Decisions to that effect are many and controlling" 302 U.S. 90, 94 (1937) (citations omitted). The decision in *Puget Sound* was expressly followed in *Joseph* v. *Carter & Weeks Stevedoring Co.*, 330 U.S. 422, 433 (1947).

In *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69 (1946), which raised essentially the same issue in the context of the Import-Export Clause (Article I, § 10, cl. 2), this Court held that an attempt by the State of California to impose a sales tax at the moment title to fuel oil passed as it was delivered into a ship for carriage to a foreign destination was invalid because "[t]he incident which gave rise to the accrual of the tax was a step in the export process." 329 U.S. at 84.*

Mr. Justice Rutledge in *Nippert* v. *City of Richmond*, 327 U.S. 416 (1946), which invalidated a municipal ordinance that imposed a license fee upon the business of soliciting orders for the purchase of goods to be shipped interstate, dealt at some length with the concept of a "local incident" which is constitutionally necessary to support the imposition of a tax upon a component of interstate commerce. In *Nippert*, the Court stated (327 U.S. at 423-424):

> "If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from 'the transportation or intercourse which is' the commerce itself and then to lay the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial economic effects of the tax upon commerce. For the situation is difficult to think of in which some incident of an interstate transaction taking place within a State could not be segregated by an act of mental gymnastics and made the fulcrum of the tax. All interstate commerce takes place within the confines

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* See, in addition, *Carson Petroleum Co.* v. *Vial*, 279 U.S. 95, 101 (1929); *Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232, 275-278 (1872); *Norris* v. *City of Boston*, 48 U.S. (7 How.) 283, 464 (1849). See also *Memphis Steam Laundry* v. *Stone*, 342 U.S. 389 (1952); *Ozark Pipe Line Co.* v. *Monier*, 266 U.S. 555 (1925); *United Fuel Gas Co.* v. *Hallanan*, 257 U.S. 277 (1921); *Texas Gas Transmission Corp.* v. *Benson*, 444 S.W.2d 137 (Tenn. 1969).

of the States and necessarily involves 'incidents' occuring within each State through which it passes or with which it is connected in fact. And there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as 'separate and distinct' or 'local,' and thus achieve its desired result.

"It has not yet been decided that every state tax bearing upon or affecting commerce becomes valid, if only some conceivably or conveniently separable 'local incident' may be found and made the focus of the tax. This is not to say that the presence of so-called local incidents is irrelevant. On the contrary the absence of any connection in fact between the commerce and the state would be sufficient in itself for striking down the tax on due process grounds alone; and *even substantial connections, in an economic sense, have been held inadequate to support the local tax.* But beyond the presence of a sufficient connection in a due process or 'jurisdictional' sense, *whether or not a 'local incident' related to or affecting commerce may be made the subject of state taxation depends upon other considerations of constitutional policy having reference to the substantial effects, actual or potential, of the particular tax in suppressing or burdening unduly the commerce.*" (Emphasis added.)

Just as in *Michigan-Wisconsin Pipe Line* and in the other cases cited above, Illinois has attempted to segregate a "local incident"—namely, the loading of fuel into aircraft tanks for use in interstate flights—and to subject that "local incident" to a privilege tax even though it is an integral part of interstate commerce and does not, under any persuasive theory, represent an independent and separable local activity upon which the State may legitimately exercise its powers of taxation to impose a privilege tax. As this Court stated in *Joseph* v. *Carter & Weeks, Co.*:

"The transportation in commerce, *at the least, begins with loading* and ends with unloading. Loading and

> unloading has effect on transportation outside the taxing state because those activities are not only preliminary to but are an essential part of the safety and convenience of the transportation itself." 330 U.S. at 427-428. (Emphasis added.)

So, also, in *Baltimore & Ohio Southwestern R.R. Co.*, v. *Burtch*, 263 U.S. 540, 544 (1924), this Court stated unequivocally that "[i]t is too plain to require discussion that the loading or unloading of an interstate shipment by the employees of a carrier is so closely related to interstate transportation as to be practically a part of it. . . ." And, in *Railway Express Agency* v. *Virginia*, 347 U.S. 359 (1954), discussed *supra* at page 23, this Court held that the local pickup and delivery of parcels which travelled in interstate commerce were insufficient "local incidents" to sustain the imposition of a state tax thereon.

This unbroken line of decisions of this Court makes it manifest that the act of loading an interstate shipment is not a sufficient "local incident" which will support the imposition of a state privilege tax. It follows that the attempt by Illinois to impose its privilege-use tax upon the act of loading all the fuel aboard United's aircraft in Chicago for immediate utilization by interstate and foreign flights is a direct burden on interstate commerce prohibited by the Commerce Clause.

Taxing the loading of the fuel is as direct a tax on interstate commerce as taxing its consumption during such commerce, condemned by *Helson and Randolph* v. *Kentucky*, 279 U.S. 245 (1929).* See also *Bingaman* v. *Golden Eagle*

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* As discussed in Part II, *infra* at pages 44-50, the Illinois Supreme Court inexplicably concluded that *Helson* forbade taxing that portion of the Illinois-laden fuel burned in the State but did not prohibit taxing all of the fuel loaded in Illinois regardless where it is consumed.

*Western Lines*, 297 U.S. 626, 629 (1935); *McCarroll* v. *Dixie Greyhound Lines, Inc.*, 309 U.S. 176, 180 (1939); *Mid-Continent Air Express Corp.* v. *Lujan*, 47 F.2d 266, 267-268 (D. N.M. 1931).

The Illinois Supreme Court relied upon *Edelman* v. *Boeing Air Transport*, 289 U.S. 249 (1933), and *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U.S. 249 (1933), for the proposition that Illinois could constitutionally tax *all* of the fuel loaded in Chicago. The lower court misapplied these decisions, which predate the authorities outlined above. Indeed, far from sustaining the lower court's position, these cases add considerable support to United's argument.

*Edelman* and *Nashville* both involved state taxes the legal incidence of which was explicitly upon the storage of fuel, upon its withdrawal from storage, or upon both of these events. In each instance the tax was imposed on or before withdrawal of the fuel without regard to what was done with the fuel thereafter. The tax consequence was the same whether the fuel was loaded into an airplane, a railroad engine, a tank truck or a pipeline. These cases, therefore, are distinguishable from the instant case, where the incidence of the use tax is determined according to the receptacle into which the fuel is loaded—i.e., taxable if loaded into the tanks of an airplane or of a railroad locomotive, but not if placed in a tank truck or tank car, thus making the loading the taxable event. The difference between taxing withdrawal and taxing loading was recognized in *Nashville C. & St. L. Ry.* v. *Wallace*, where this Court stated (288 U.S. at 268):

> "[T]here can be no valid objection to the taxation of the exercise of any right or power incident to appellant's ownership of the gasoline, which falls short of a tax directly imposed on its use in interstate commerce, deemed forbidden in *Helson* v. *Kentucky, supra.*

> Here the *tax is imposed on* the successive exercise of two of those powers, *the storage and withdrawal from storage* of the gasoline. *Both powers are completely exercised before use of the gasoline in interstate commerce begins.* The tax imposed upon their exercise is therefore not one imposed on the use of the gasoline as an instrument of commerce and the burden of it is too indirect and remote from the function of interstate commerce itself to transgress constitutional limitations." (Emphasis added.)

The foregoing passage was quoted with approval in *Edelman* v. *Boeing Air Transport*, 289 U.S. at 252, with the conclusion ". . . that the statute as applied [in *Edelman*] is identical in operation with that sustained in *Nashville*. . . ."

The constitutional difference between the instant case and *Edelman* and *Nashville* has numerous parallels. In *American Oil Co.* v. *Neill*, 380 U.S. 451, 455 (1965), and *Spector Motor Service, Inc.* v. *O'Connor*, 340 U.S. 602, 608 (1951) (see footnote at page 20, *supra*), this Court emphasized that it is the "operating incidence" of the state tax which is the critical factor in determining its constitutionality under the Commerce Clause, and that if that incidence takes the form of a privilege tax upon engaging in interstate commerce—such as Illinois' privilege-use tax upon the loading of fuel in the instant case—the tax must fall under the Commerce Clause. If the tax is levied on that which is constitutionally protected from state interference, it will not be saved by the contention that the same amount of tax might validly have been collected under some other form. Compare *Railway Express Agency* v. *Virginia*, 347 U.S. 359 (1954) (privilege tax for doing interstate business in State unconstitutional) with *Railway Express Agency* v. *Virginia*, 358 U.S. 434 (1954) (franchise tax, in lieu of intangible property tax, measured by gross receipts derived within State constitutional). See also *McLeod* v. *J. E. Dil-*

*worth Co.*, 322 U.S. 327, 330 (1944). When the State attempts to impose a privilege tax upon an integral aspect of interstate commerce, it has surpassed the bounds of its constitutional powers.

The distinction between a privilege tax imposed upon an integral part of interstate commerce and other forms of taxation, such as a user charge or fee for services rendered by the State, was recently reiterated by this Court in *Evansville-Vanderburgh Airport Authority Dist.* v. *Delta Airlines*, 92 S.Ct. 1349 (1972), which held that the States may properly impose a reasonable user charge upon interstate carriers or travelers in order to compensate the States for the services they provide for them. This Court distinguished such user fees from taxes imposed upon the privilege of engaging in interstate commerce, 92 S.Ct. at 1353-1354, by comparing *Hendrick* v. *Maryland*, 235 U.S. 610 (1915), which sustained a fee upon drivers to defray road construction and repair costs, with *Spector Motor Service, Inc.* v. *O'Connor*, 340 U.S. 602, 605 (1951). Mr. Justice Brennan, speaking for the Court, stated, 92 S.Ct. at 1354, n. 6, that

> "... in striking down a state tax construed as falling 'upon the privilege of carrying on a business that was *exclusively* interstate in character,' *Spector Motor Service, Inc.* v. *O'Connor*, 340 U.S. 602, 605 (1951) (emphasis in original), the Court expressly distinguished it from a tax 'levied as compensation for the use of highways.' *Id.*, at 607."

In the instant case, Illinois has attempted to accomplish the equivalent to what Connecticut had sought in *Spector*, namely, to impose a privilege tax directly upon an integral aspect of interstate commerce. The tax itself is denominated a "privilege" tax, Ill. Rev. Stat. 1961-1971, ch. 120, § 439.3, and has been characterized as such by the Illinois

Supreme Court. *Turner* v. *Wright*, 11 Ill.2d 161, 164-165, 142 N.E.2d 84, 86-87 (1957). As previously noted (page 6, *supra*), under the Municipal Ordinances of the City of Chicago, United and other carriers are obligated to pay fees for the use of the Chicago airports to compensate the City fully for the operation, maintenance and financing of the airport facilities. In contrast (see page 5, *supra*), the funds derived from the Illinois use tax are placed in the State's General Revenue Fund and are used for general revenue purposes (with the exception of that portion which is used for support of the public schools).* Therefore, no persuasive argument can be advanced that the use tax may be viewed as compensation for any specific services provided by the State.

To summarize, Illinois seeks to lay a privilege tax upon an integral aspect of interstate commerce, namely, the loading of fuel aboard aircraft about to depart in interstate and foreign operations. Under the consistent rulings of this Court, including the most recent pronouncement in the *Evansville-Vanderburgh* case, the Illinois use tax cannot be so imposed without violating the Commerce clause.

### B. The Illinois Use Tax Unconstitutionally Burdens Interstate Commerce If It Is Based Upon the Mere Intention of United to Use the Fuel Temporarily Stored in Chicago to Facilitate Its Interstate Operations.

The *per curiam* opinion of the Illinois Supreme Court declares that the interstate commerce cases discussed above in support of United's position are inapplicable because,

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* In addition, United, with other carriers, is subject to Illinois real and personal property taxes on property in Illinois, income tax on income derived from that State, and sales and use taxes on the purchase or use of property in Illinois. See respectively Ill. Rev. Stat., 1971, ch. 120, §§ 482-811; 1-101 to 17-1701; 440-453; 439.1-439.22.

under the plain language of the Illinois statute, the temporary storage exception can only apply to fuel to be used (burned) "solely outside this State." (App. 202.) The opinion follows this with a *non sequitur:*

> "... United does not store in Illinois with any intention that the fuel will be used solely outside this State. Rather, the fuel is *stored here only to facilitate United's [interstate] operations from the O'Hare and Midway airports within the State.* Under the circumstances, the 'storage' becomes something more than a 'temporary storage' for safekeeping prior to its use solely outside of Illinois." (App. 202.) (Emphasis added.)

If this passage is to be taken literally, the Illinois Court has concluded that United's storage of the fuel in Chicago for the purpose of facilitating its interstate and foreign flights from the Chicago airports rendered the temporary storage exemption unavailable to United.*

This extraordinary reasoning would make all the fuel temporarily stored in Illinois by United subject to the use tax because—and only because—it is held for interstate flights departing from Chicago. It causes the use tax to be a direct, unconstitutional burden upon an integral aspect of interstate commerce by virtue of the same decisions of this Court discussed in Part IA of this Brief, pages 21-27, *supra,* as well as a clear discrimination against interstate commerce of the type which has been consistently condemned by this Court. See, e.g., *Halliburton Oil Well Cementing Co.* v. *Reilly,* 373 U.S. 64, 69-70 (1963) and cases cited therein; *Memphis Steam Laundry* v. *Stone,* 342 U.S. 389, 394-395 (1952); *Nippert* v. *City of Richmond,* 327 U.S. 416, 425-426 (1946); *Best & Co.* v. *Maxwell,* 311 U.S. 454, 455-456 (1940). Compare *Evansville-Vanderburgh Airport* v. *Delta*

* As mentioned previously, there are no intrastate flights involved in this litigation.

*Airlines*, 92 S.Ct. 1349, 1355 (1972) (airport user fees did not discriminate against interstate commerce).

Moreover, the Illinois Court has in effect *conditioned* the availability of the temporary storage exemption to common carriers upon the fuel *not* being stored by them to facilitate the operation of interstate flights departing from Illinois. Ever since *Western Union Telegraph Co.* v. *Kansas*, 216 U.S. 1, 30-37 (1910), holding that Kansas could not impose a capital stock fee computed on the total authorized capital of Western Union as a condition to conducting local business in Kansas, such a condition upon commerce has been clearly unconstitutional. See, *e.g.*, *Quaker City Cab Co.* v. *Pennsylvania*, 277 U.S. 389 (1928) (State cannot impose upon a foreign taxicab company, as a condition of doing business locally, a tax that is invalid under the Equal Protection Clause); *Frost & Frost Trucking Co.* v. *Railroad Commission*, 271 U.S. 583 (1926) (State cannot constitutionally affix to the privilege of using highways the condition that a carrier assume all the burdens and duties of a common carrier); *Terral* v. *Burke Const. Co.*, 257 U.S. 529 (1922) (State law invalid which requires foreign corporation, as a condition of continuing to do business, to refrain from resorting to Federal courts).*

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* The impermissibility of a State's imposing unconstitutional conditions upon the exercise of a legally protected activity, such as the right to engage in interstate commerce, continues to be reiterated by the courts. See, e.g., *Dunn* v. *Blumstein*, 92 S.Ct. 995 (1972); *Garrity* v. *New Jersey*, 385 U.S. 493, 500 (1967); cf. *Watson* v. *Employers Liability Corp.*, 348 U.S. 66, 73 (1954); *id.* at 78-81 (Frankfurter, J., concurring and reviewing authorities); *Patton* v. *North Carolina*, 381 F.2d 636, 640 n. 10 (4 Cir. 1967), *cert. denied*, 390 U.S. 905 (1968). The right to participate in interstate commerce has been accorded the same freedom from direct taxation as other constitutional rights on the theory that the "power to tax the exercise of a privilege is the power to control or supress its enjoyment." *Murdock* v. *Pennsylvania*, 319 U.S. 105, 112 (1943).

### C. The Application of the Illinois Use Tax to All the Fuel Loaded Aboard United's Interstate Flights Departing Illinois Results in Multiple State Taxation of That Fuel, and Bears no Relationship to Any Services Provided by the State, in Violation of the Commerce and Due Process Clauses of the Constitution.

This Court has consistently struck down taxes on interstate activities where there is a mere threat of multiple state taxation. Thus, in *Gwin, White & Prince* v. *Henneford*, 305 U.S. 434, 439 (1939), involving the imposition of a Washington state privilege tax measured by gross receipts (as is the Illinois use tax), this Court invalidated the attempt to impose such a tax on the business of marketing fruit which was sold and shipped to various states and foreign countries, stating (*id.*, at 439):

> "Such a [privilege tax measured by gross receipts], at least when not apportioned to the activities carried on within the state [citations omitted], burdens the commerce in the same manner and to the same extent as if the exaction were for the privilege of engaging in interstate commerce and would, if sustained, expose it to multiple tax burdens, each measured by the entire amount of the commerce, to which local commerce is not subject.
>
> "Here, the tax, measured by the entire volume of the interstate commerce in which appellant participates, is not apportioned to its activities within the state. If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, *though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden*

*to which local commerce is not exposed.*" (Citations omitted and emphasis added.)

Numerous other cases decided by this Court have invalidated state privilege or similar taxes which were held to have an unconstitutional impact upon interstate commerce. For example, in *Freeman* v. *Hewit*, 329 U.S. 249 (1946), an Indiana tax upon the gross income derived from interstate sales was invalidated on the ground that it placed a direct burden on interstate commerce. This Court rejected the argument that multiple taxation of the same transactions by other States had not in fact occurred. It was sufficient, said the Court, speaking through Mr. Justice Frankfurter, that the tax directly burdened interstate commerce, *id.*, at 256-257:

> "The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment. Courts are not possessed of instruments of determination so delicate as to enable them to weigh the various factors in a complicated economic setting which, as to an isolated application of a State tax, might mitigate the obvious burden generally created by a direct tax on commerce. *Nor is there any warrant in the constitutional principles heretofore applied by this Court to support the notion that a State may be allowed one single-tax-worth of direct interference with the free flow of commerce. An exaction by a State from interstate commerce falls not because of a proven increase in the cost of the product. What makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce.*" (Emphasis added).

The Court in *Freeman* relied in particular upon *Adams Mfg. Co.* v. *Storen*, 304 U.S. 307 (1938), in which this Court likewise invalidated the same Indiana privilege tax upon

the receipt of gross income from the interstate sale of road machinery and equipment.*

But this case does not involve potential multistate taxation of the same fuel. Such taxation exists. The purchase of all the fuel in Indiana is subject to the Indiana gross income tax. On an average, the taxable purchase in Indiana occurs 10 days prior to the loading of the fuel aboard aircraft in Illinois. (See Tr. 213-214, App. 129; Tr. 296-297, App. 156-157.) Such multistate taxation has uniformly been held by this Court to be repugnant to the Commerce Clause. *E. g., Central Greyhound Lines* v. *Mealey*, 334 U.S. 653, 662-663 (1948) and cases cited therein; *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250, 255-257 (1938); *cf. General Motors Corp.* v. *District of Columbia*, 380 U.S. 553, 559-560 (1965).

In addition to the Commerce Clause requirements, as this Court recently noted in the *Evansville-Vanderburgh* case, 92 S.Ct. at 1353 n. 5, a State's jurisdiction to tax is

> ". . . limited by the due process requirement that the 'taxing power exerted by the state [bear] fiscal relation

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* In the *Adams* case, this Court stated, 304 U.S. at 311-312:
"The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that *the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by States in which the goods are sold as well as those in which they are manufactured.* Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids. We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by Article I, § 8 of the Constitution. [Footnote omitted.] The opinion of the State Supreme Court stresses the generality and nondiscriminatory character of the exaction, but *it is settled that this will not save the tax if it directly burdens interstate commerce.* [Footnote omitted.]" (Emphasis added.)

to protection, opportunities and benefits given by the state.' *Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435, 444 (1940)."

As previously noted, (pages 5-6, 29-30, *supra*), the Illinois use tax on the fuel involved is not designed to, nor does it bear, any reasonable relationship to services provided by the State to United or other carriers. Not only is the revenue derived from the tax placed in the State Treasury's General Revenue Fund for general state expenses and the public schools, but there are no substantial services provided by the State to the carriers, who are otherwise obligated to pay substantial fees to the City of Chicago that fully support the construction, maintenance and operation of the Chicago airports. Thus the exaction of the use tax on all the fuel is invalid under the Due Process Clause of the Fourteenth Amendment because it bears no "fiscal relation to [the] protection, opportunities and benefits given by the state."

### D. The Imposition by Illinois of a Use Tax on All Fuel Loaded Aboard United's Interstate and Foreign Flights Departing From Chicago Constitutes a Toll Upon Interstate Commerce in Contravention of the Fundamental Premises of the Commerce Clause—Where All of the Fuel is Purchased Outside Illinois, Rests in Illinois Only for Such Period as is Necessary for the Support of United's Interstate Operations, and Except for Insignificant Amounts is Actually Consumed Outside Illinois.

Heretofore this Brief has focused on a series of specific constitutional rules which would prohibit Illinois from applying its use tax to all of the fuel loaded by United on its interstate and foreign flights departing Chicago. Underlying these specific issues is the broader question whether, in light of the basic rationale of the Commerce Clause, Illi-

nois should be able to tax all the jet fuel loaded in Chicago by United, even though it is all purchased in another State in a taxable transaction, is stored by United in Illinois only for such period as is necessary to facilitate its interstate and foreign operations from the Chicago airports, and almost all of it is actually consumed outside Illinois.

As was more fully described in the Statement of the Case (pages 16-17, *supra*), Chicago is the hub of United's nationwide operations. Solely because of its geography, Chicago receives a huge volume of air service from United and other carriers not attributable to Chicago's own traffic. Much of this service is through traffic with no local aspect. For it, Chicago is merely a connecting link in a never-ending series of continuous interstate movements that begin and end outside of Illinois. For example, only 5.4% of the United system's passengers originate at Chicago, but 13% of its daily flights depart from there, and 16.5% of its total fuel is loaded there. About 5 out of 8 of United's Chicago passengers are through passengers. The Chicago airports' role in this through traffic is merely to enable passengers to transfer from one flight to another, and to load fuel and supplies aboard the aircraft which remain on the ground no longer than is necessary to perform these functions. Because of Chicago's transit role, United must temporarily store great quantities of aviation fuel each year at Chicago for operational purposes. This fuel comes to rest in Chicago only for such period as is necessary for purification and for the conduct of United's interstate operations.*

Of some 250 million gallons of fuel loaded each year by United on some 85,410 interstate flights departing Chicago, only small amounts of Illinois-laden fuel are consumed in

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*See generally pages 10-17, *supra*.

Illinois by about 3.7% of these departures. The remainder of the fuel is actually consumed in and over the other States, a substantial portion after one or more intermediate stops. (See pages 12-16, *supra*.)

The unreality of Illinois' position becomes apparent by reference to the safety fuel reserve requirements of the FAA and United (as approved by the FAA), described on pages 12-14 above, which require air carriers to load large quantities of fuel which are not to be consumed on the particular flight, but must be on board at its destination in another State.* The extensive surveys of United indicates that this reserve ranges, depending on aircraft type, from 35% to 60%** of the fuel loaded in Chicago. (See Stipulation, Appendix 2, App. 43.) For Illinois to impose its use tax on this fuel, which under Federal regulation is to be used on later flights between other States, and which in fact is so used, in reality is a toll on commerce albeit not in classical form.

In effect, therefore, Illinois has sought to gain undue advantage from the geographical happenstance which funnels such a high volume of interstate traffic through the Chicago airports. Its tax bears no relation—and, indeed, is not designed to bear any relation—to the fuel which is actually consumed in Illinois. Yet the theory of a use tax is that it is imposed on the use or consumption of property within the State. Nor does the toll bear any reasonable relation to fair compensation to the State for services rendered. When "the amount of the tax exceed[s] fair compensation to the State," *Capitol Greyhound Lines* v. *Brice*,

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* As indicated on page 13 above, these reserves are in fact on board for essentially all flights.

** The 60% figure is for the Boeing 727, which represents more that half of the departures surveyed. (See Stipulation, Appendix 2, App. 43; UA Ex. 26, App. 238-239, Tr. 118.)

339 U.S. 542, 544 (1950), the tax in question has consistently been invalidated by this Court. 339 U.S. at 554 & n. 3. See generally *Evansville-Vanderburgh Airport Authority Dist.* v. *Delta Airlines, supra,* 92 S.Ct. at 1354.

It was precisely this sort of exploitation of geography that was deemed to be a major defect in the Articles of Confederation that the Framers of the Federal Constitution sought to extirpate. For example, Alexander Hamilton in the *Federalist* observed the dire consequences for commercial relationships which had resulted in the German states because of the imposition of tolls upon commerce as it passed through each principality:

> "The commerce of the German empire is in continual trammels from the multiplicity of the duties which the several princes and states exact upon the merchandise passing through their territories, by means of which the fine streams and navigable rivers with which Germany is so happily watered are rendered almost useless."*

Likewise, James Madison noted the extreme dissatisfaction which arose when certain of the States imposed tolls for the passage of commerce through their territory and how this defect was intended to be cured by the new Constitution:

> "The other source of dissatisfaction [with the Articles of Confederation] was the peculiar situation of some of the States, which having no convenient ports for foreign commerce, were subject to be taxed by their neighbors, thro' whose ports, their commerce was carried on. New Jersey placed between Phila. & N. York, was likened to a cask tapped at both ends; And N. Carolina, between Virginia & S. Carolina to a patient

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* *The Federalist Papers,* No. 22, at 145 (Mentor ed. 1961). See, in addition, *The Federalist Papers,* No. 7, at 62-63 (Hamilton) (Mentor ed. 1961).

> bleeding at both Arms. The Articles of Confederation provided no remedy for the complaint; which produced a strong protest on the part of N. Jersey; and never ceased to be a source of dissatisfaction & discord, until the new Constitution superseded the old."*

So, also, Mr. Justice Story, in his *Commentaries on the Constitution*, noted the perpetual "irritation and jealousy" which arose because of the tolls which various of the States laid upon merchandise passing through their territory and that therefore one of the principal reasons for affording to Congress the power to regulate commerce among the States was to eliminate the stifling effect upon commerce caused by these state-imposed duties. J. Story, *Commentaries on the Constitution of the United States*, Book II, §§ 259, 260 (4th ed. Cooley 1873).**

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* *The Writings of James Madison*, Vol. 2, p. 395 (Hunt ed. 1901). See, in addition, *The Federalist Papers*, No. 42, at 267-268 (Madison) (Mentor ed. 1961).

** See generally Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 Yale L.J. 219, 228 (1957):

> "... One need not go back to the castles on the Rhine and the Loire, to the hazards and burdens of the overland routes to the Far East, in order to measure the power and ascertain the position of the tolltaker on a strategic trade route. Our own preconstitutional history discloses that the ports and the states astride the trade routes exploited their situation to the disadvantage and displeasure of their less strategically situated neighbors, and that recriminations and reprisals resulted. On more than one occasion, *The Federalist* refers to this unhappy situation and holds out the promise that the proposed Constitution will end it."

See, in addition, Brown, *supra*, at 228-233; Hartman, *State Taxation of Interstate Commerce: A Survey and an Appraisal*, 46 Va. L. Rev. 1051, 1053, 1054, 1089 (1960); *Developments in the Law—Federal Limitations on State Taxation of Interstate Business*, 75 Harv. L. Rev. 953, 968-972 (1962).

This Court has frequently and consistently recognized that the elimination of tolls upon interstate commerce was a principal objective of the Commerce Clause, and, indeed, a major factor in the formulation of the Federal Constitution.* Thus, for example, in *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, 445-446 (1827), Mr. Chief Justice Marshall stated that the basic rationale of the Commerce Clause was to permit Congress, rather than the States, to exert control over interstate commerce. The Chief Justice continued (*id.*, at 449):

> "If the States may tax all persons and property found on their territory, what shall restrain them from taxing goods in their transit through the State from one port to another, for the purpose of re-exportation? The laws of trade authorize this operation, and general convenience requires it. *Or what should restrain a State from taxing any article passing through it from one State to another, for the purpose of traffic? or from taxing the transportation of articles passing from the State itself to another State, for commercial purposes?* These cases are all within the sovereign power of taxation, but would obviously derange the measure of Congress to regulate commerce, and affect materially the purpose for which that power was given." (Emphasis added.)

As Mr. Justice Grier noted in *Norris* v. *City of Boston*, 48 U.S. (7 How.) 283, 464 (1849), a State may not refuse a right of passage to persons or property through her territory, or . . . *exact a duty for permission to exercise it.*"

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* As Mr. Chief Justice Vinson noted in more recent times, "The Commerce Clause created the nation-wide area of free trade essential to this country's economic welfare by removing state lines as impediments to intercourse between the states." *Memphis Steam Laundry* v. *Stone*, 342 U.S. 389, 395 (1952). See also *Hood & Sons* v. *Du Mond*, 336 U.S. 525, 532-534 (1949).

(Emphasis added.) To the same effect, see *Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232, 275-278 (1872).* More recently, in *Joseph* v. *Carter & Weeks Stevedoring Co.*, 330 U.S. 422, 434 (1947), this Court stated that "[t]he avoidance of . . . a local toll on passage of commerce through a locality was one of the reasons for the adoption of the Commerce Clause." Again, in *Freeman* v. *Hewit*, 329 U.S. 249, 254 (1946), this Court stated, in invalidating the Indiana gross income tax as applied to certain interstate sales, that "the aim of the Commerce Clause was precisely to

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* In the *Case of the State Freight Tax*, Mr. Justice Strong stated in his opinion for the Court:

"The legislature of Pennsylvania has in effect declared that every ton of freight taken up within the State and carried out, or taken up in other States and brought within her limits, shall pay a specified tax. *The payment of that tax is a condition, upon which is made dependent the prosecution of this branch of commerce. And as there is no limit to the rate of taxation she may impose, if she can tax at all, it is obvious the condition may be made so onerous that an interchange of commodities with other States would be rendered impossible.* The same power that may impose a tax of two cents per ton upon coal carried out of the State, may impose one of five dollars. *Such an imposition, whether large or small, is a restraint of the privilege or right to have the subjects of commerce pass freely from one State to another without being obstructed by the intervention of State lines.* It would hardly be maintained, we think, that had the State established custom-houses on her borders, wherever a railroad or canal comes to the State line, and demanded at these houses a duty for allowing merchandise to enter or to leave the State upon one of those railroads or canals, such an imposition would not have been a regulation of commerce with her sister States. Yet it is difficult to see any substantial difference between the supposed case and the one we have in hand." 82 U.S. (15 Wall.) at 276. (Emphasis added.)

prevent States from exacting toll from those engaged in national commerce."*

Yet to establish a toll upon all fuel passing through Illinois to support United's interstate operations, no matter where that fuel was purchased, no matter that its purchase was already taxed, and no matter that almost all of it will be consumed in other States, is precisely what Illinois seeks to accomplish. The situation would hardly be different if the State had actually erected customhouses at the Chicago airports and had demanded payment to the State for the "privilege" of loading fuel so that United and other carriers could engage in interstate commerce. Illinois has in fact created the functional "equivalent to a rampart of customs duties" (*Baldwin* v. *G.A.F. Seelig*, 294 U.S. 511, 527 (1935) (Cardozo, J.)) on the fuel loaded on United's interstate and foreign flights passing through Chicago. This "unreasonable clog upon the mobility of commerce" (294 U.S. at 527) constitutes a substantial violation of the fundamental rationale of the Commerce Clause, which has been repeatedly enunciated by the Founding Fathers and by this Court. With insight, this Court has held in *Spector Motor Service* v. *O'Connor*, 340 U.S. 602, 610 (1951):

> "In this field [of the taxation of interstate commerce] there is not only reason but well established precedent for keeping the federal privilege of carrying on exclusively interstate commerce *free from State taxation*. To do so gives lateral support to one of the cornerstones of our constitutional law—*M'Culloch* v. *Maryland* [17 U.S. (4 Wheat.) 316 (1819)]." (Emphasis added.)

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* See also *Canton R. Co.* v. *Rogan*, 340 U.S. 511, 516-517 (1951) (opinion of Jackson and Frankfurter, JJ., reserving judgment); *Alaska* v. *Arctic Maid*, 366 U.S. 199, 206 (1961) (Harlan, J., dissenting): "I also regard the tax as invalid because it in effect charges a toll for the interstate transportation of Alaska's natural resources. See Brown, The Open Economy: Justice Frankfurter and the Position of the Judiciary, 67 Yale L.J. 219, 232-233."

**II. In the Alternative Illinois Can Tax, at Most, Only That Portion of the Fuel Loaded in Illinois That Is Actually Consumed in Illinois.**

United has argued in the lower courts, for the reasons stated in Part I of this Brief, that the Illinois use tax, applied to all the fuel which United loads upon its aircraft departing from Chicago, is both an unconstitutional burden upon interstate commerce and denies United due process of law.

United alternatively has suggested, however, that the construction of the Use Tax Act long followed by the Illinois Department of Revenue—namely, that the tax is due on that portion of the fuel which is both stored and burned in Illinois—might satisfy constitutional requirements. Under this burn-off rule the amount of the tax is imposed on the non-exempt temporary storage as measured by the amount of the fuel consumed or burned off in Illinois.

As previously mentioned (page 9 *supra*), the *per curiam* opinion of the Illinois Supreme Court rejected this interpretation of the Illinois Use Tax Act, reasoning that the decision of this Court in *Nelson and Randolph v. Kentucky*, 279 U.S. 245 (1929), which prohibited any direct tax on interstate commerce, also prohibited any tax levied upon a local activity merely because measured (as might be a property tax) upon property used in interstate commerce. (App. 197-198.) The four-justice majority of the Illinois court also incorrectly applied *Edelman v. Boeing Air Transport*, 289 U.S. 249 (1933), to conclude that Illinois may apply its existing Use Tax Act so as to tax all fuel loaded by United on its interstate flights leaving Chicago. (App. 200-201. See generally pages 8-10, *supra*.) This reasoning produces

the incongruous result that the taxation of all the fuel loaded into United's planes at Chicago is deemed less of a burden on interstate commerce than taxing only that portion which is actually consumed in Illinois.

The flaw in the lower court's reasoning is that if *Helson* controls the instant situation, it prohibits taxing any of the fuel loaded (see page 26 *supra*); it cannot properly be applied halfway to preclude taxing only that portion stored and consumed in Illinois.

*Helson* involved a Kentucky gasoline tax which was imposed upon the use of fuel within the State. There the interstate carrier purchased fuel in Illinois, and brought it into Kentucky in the fuel tanks of a river ferry, from which it supplied the propulsive power for the ferry as it traversed the Ohio River. The fuel was neither stored nor withdrawn from storage in Kentucky, so the only possible incidence of the Kentucky tax was upon the consumption of the fuel during the ferry's interstate journey. Such a tax unquestionably constituted a direct, unconstitutional burden upon interstate commerce. Indeed, the fuel sought to be taxed in *Helson* is analogous to the fuel brought into Illinois in United's planes, which Illinois has never sought to tax.

The principle established by *Helson* is not applicable to the instant situation. Under the Illinois Use Tax Act, fuel brought into the State for storage or for any other purpose becomes taxable as soon as it comes to rest, because there has been an exercise in Illinois of a right or power over the property incident to its ownership (Ill. Rev. Stat., 1961 to 1971, ch. 120, § 439.2), unless such "use" falls within an exception such as that for temporary storage. If some of the fuel stored in Illinois is actually consumed in the State, the use tax is due on that portion of the fuel, because there has been an exercise of dominion over the property

from the time it came to rest in Illinois, which does not qualify for the statutory exemption—*i.e.*, that fuel has not been used outside the state.* In effect, the tax is imposed on the storage of the fuel prior to the loading, albeit measured by the amount consumed in the State; accordingly, it does not constitute a direct tax on interstate commerce. This is the true rationale of the burn-off rule. It is a distortion to characterize its application as a direct tax on the

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* Both the *per curiam* and concurring opinions imply, although they are definitely not explicit, that if *any* of the fuel stored by United at Chicago is burned over Illinois, the statutory requirements are not met because *all* of the fuel is not solely used outside Illinois. The Court could not have intended, with any regard to due process, to apply this concept to the totality of the fuel stored, because this would mean that if one gallon were burned in Illinois out of the 250,000,000 stored each year, all should be subject to use tax. If the concept were intended to be applied on a plane-by-plane-basis so that if any Illinois-laden fuel were burned in Illinois by a particular flight, all of the fuel loaded on that plane would be taxable because it was not used solely outside Illinois, the application would be directly contrary to the teaching of *McCarroll* v. *Dixie Greyhound Lines*, 309 U.S. 176, 178-179 (1940), discussed at pages 47-48, *infra*. It would also violate fundamental concepts of due process because it appears that a least 64.30% and more probably 96.70% of all of United's departures from Illinois do not burn more than *de minimus* amounts of Illinois-laden fuel in this State. See *Evansville-Vanderburgh Airport Authority Dist.* v. *Delta Airlines*, *supra*, at 1353 n. 5; *Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435, 444 (1940). Moreover, even if it were deemed, contrary to the evidence, that on every flight the Illinois-laden fuel *is completely mixed* with the cold landed fuel, only about 15%, on the average, of Illinois-laden fuel is burned in Illinois by United's flights as they leave the State on the FAA-assigned departure routes. (See Stipulation, Appendix 2, App. 43; UA Exs. 21, 26, 27, App. 234, 238-239, 240, Tr. 100, 118, 120.) In short, regardless of how rigorously the undisputed evidence is construed against United, there is no fair and reasonable basis for Illinois taxing all of the fuel loaded aboard United's aircraft at Chicago.

consumption of fuel in interstate commerce, prohibited by *Nelson*.

It is established that if there is a local event on which to impose a state tax, it may constitutionally be measured by that part of interstate activities that occur within the State, provided the measure is reasonable. Authority for this proposition is fully expounded in *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines Inc.*, 92 S.Ct. 1349, 1354-1355 (1972). One such measure is fuel consumption within a state by vehicles moving in interstate commerce. See *McCarroll* v. *Dixie Greyhound Lines*, 309 U.S. 176, 178-79 (1940). See also *Thompson* v. *Continental Southern Lines*, 222 Ark. 108, 257 S.W.2d 375, 377 (1953); *Larey* v. *Continental Southern Lines*, 243 Ark. 278, 419 S.W.2d 610, 614 (1967); *Department of Revenue* v. *Greyhound Corp.*, 321 S.W.2d 60, 61 (Ky. 1959); *Lake Shore Coach Lines* v. *Alger*, 327 Mich. 146, 41 N.W.2d 503, 508 (1950); *Mason & Dixon Lines* v. *Commonwealth*, 185 Va. 877, 41 S.E.2d 16 (1947), *cert. denied*, 331 U.S. 807 (1947).*

In the leading case of *McCarroll* v. *Dixie Greyhound Lines*, *supra*, this Court held that highway carriers engaged

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* In various other circumstances in which a local aspect of interstate commerce was properly subject to state taxation, the courts have sustained a tax measured by the activities carried on within the taxing jurisdiction. See *e.g.*, *Alaska* v. *Arctic Maid*, 366 U.S. 199, 203-205 (1961) (occupation tax on freezer ships measured by value of fish obtained for processing); *Asiatic Trans-Pacific* v. *Maddox*, 371 F.2d 132, 134-135 (9 Cir. 1967) (where services as agent for van and storage companies were performed in Guam, privilege tax measured by gross receipts from services was permissible); *Higman Towing Co.* v. *Cocreham*, 70 F.Supp. 628, 635 (E.D. La. 1947), *aff'd*, 165 F.2d 789 (5 Cir. 1948) (sustained income tax on petroleum transportation company measured by number of barrels transported and mileage they were transported within taxing State).

in interstate journeys may constitutionally be required to pay a state privilege and excise tax measured by the number of gallons of fuel burned within the taxing state by the carriers' vehicles using the State's highways (309 U.S. at 178-179). Significantly, this case held that the carriers could *not* constitutionally be required to pay a tax upon fuel carried in their vehicles' tanks that would be consumed in other States (309 U.S. at 180). See also *Texas Gas Transmission Corp.* v. *Benson*, 444 S.W.2d 137 (Tenn. 1969).

The *McCarroll* case both states the application of a basic constitutional principle—that the States unconstitutionally burden interstate commerce when they attempt to tax activities, in this instance fuel consumption, which occur outside of the taxing State—and underscores the vice of applying Illinois use tax to all the fuel loaded, namely, that it is not reasonably related to the activities, that is, the fuel consumption, that actually occurs in Illinois in the course of United's operations from Chicago. In short, state taxation involving interstate commerce can be justified, if at all, *only* to the extent that such taxation is designed to require such commerce to bear a fair share of the cost of the state and local governments whose protection it enjoys. *E.g.*, *Freeman* v. *Hewit*, 329 U.S. 249, 253 (1946). The rule was precisely stated in *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines Inc.*, 92 S.Ct. at 1355, as follows:

> "Thus, while state or local tolls for use of facilities must reflect a 'uniform, fair and practical standard' relating to public expenditures, it is the *amount* of the tax, not its formula, that is of central concern. At least so long as the toll is based on some fair approximation of use or privilege for use, as was that before us in *Capitol Greyhound* [339 U.S. 542 (1950)], and is neither *discriminatory against interstate commerce* nor *excessive in comparison* with the governmental benefit conferred, it will pass constitutional muster, even though some other formula might reflect more exactly

the relative use of the state facilities by individual users." (Emphasis supplied.)

This rationale has supported a variety of decisions of this Court holding that States may impose taxes measured by interstate activities so long as they bear some reasonable relationship to state benefits conferred. *Central Greyhound Lines* v. *Mealey*, 334 U.S. 653, 661-664 (1948) (State may constitutionally tax gross receipts apportioned according to mileage travelled within State but not receipts derived from mileage outside of State); compare *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450 (1959) (reasonable allocation of income to State for net income tax purposes constitutional) with *Hans Rees' Sons* v. *North Carolina*, 283 U.S. 123, 133-136 (1931) (State income tax apportionment formula unconstitutional); cf. *Norfolk & Western Ry. Co.* v. *Missouri State Tax Comm'n*, 390 U.S. 317 (1968) (property tax formula which included out-of-state property in tax base violated both Commerce and Due Process Clauses). See also *General Motors Corp.* v. *Washington*, 377 U.S. 436 (1964) (privilege tax to do business in State measured by gross receipts constitutionally permissible if fairly apportioned).

The taxation by Illinois of all of the fuel stored in Chicago by United for its interstate flights would not be based on any "fair approximation of use or privilege for use," and would be "excessive in comparison with the governmental benefit conferred" as required by *Evansville-Vanderburgh* v. *Delta*, *supra*. Thus, if this Court should conclude, contrary to United's argument in the other parts of this Brief, that Illinois has sufficient contacts with that portion of its fuel used to facilitate interstate commerce that is stored and actually burned in Illinois, or that United's activities in Illinois provide sufficient "local incidents" to sustain the State's privilege use tax, then, under the authorities previously cited in this Part, the exaction of the tax should be con-

stitutionally limited to that portion of the Illinois-laden fuel that is actually consumed by United within or over the State of Illinois.

In construing the Illinois Use Tax Act as not authorizing taxation only of the fuel consumed in Illinois, two of the four member majority below were influenced by their belief that such an interpretation would be unconstitutional (App. 197-198; see page 9, *supra*). If this Court holds both that this was erroneous and that Illinois can tax the fuel consumed within the State, the judgment should be vacated and the case should be remanded to the Illinois Supreme Court for reconsideration of its construction of the Illinois statute in the light of this Court's opinion. A remand is not necessary, of course, if the Court holds that none of the fuel consumed on appellant's interstate flights may validly be taxed.

## CONCLUSION

For the foregoing reasons, United requests this Court to reverse the judgment of the Supreme Court of Illinois and to prohibit the imposition of the Illinois use tax on United's fuel which is loaded aboard its aircraft in Chicago for departure in interstate and foreign flights, or as an alternative, to permit taxation only of that portion of the fuel consumed in Illinois.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-862

UNITED AIR LINES, INC.,

*Appellants,*

vs.

GEORGE E. MAHIN, et al.,

*Appellees.*

On Appeal From The Supreme Court of Illinois

## BRIEF FOR APPELLEES

## OPINION BELOW

The opinion of the Supreme Court of Illinois in *United Air Lines, Inc.* v. *Mahin, et al,* is reported at 49 Ill. 2d 45, 273 N.E. 2d 585 (1971) and is reproduced in the Appendix at page 193. The unreported opinion of the trial court, the Circuit Court of Cook County, is set out in the Appendix at page 185.

## JURISDICTION

The judgment of the Supreme Court of Illinois in *United Air Lines, Inc.* v. *Mahin, et al., supra,* was entered on April 1, 1971, and a timely petition for rehearing was denied by the same court on October 4, 1971. The notice of appeal was filed in the Supreme Court of Illinois on December 20, 1971. The appellant's Jurisdictional Statement was filed in this Court on January 3, 1972, claiming that this Court had jurisdiction to review on appeal the aforementioned judgment of the Supreme Court of Illinois pursuant to Title 28, United States Code, Section 1257(2). This Court noted probable jurisdiction on March 20, 1972.

## CONSTITUTIONAL PROVISIONS

Article I, Section 8, clause 3 of the United States Constitution provides, in pertinent part:

> "The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, . . ."

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> ". . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## STATUTE INVOLVED

Illinois Revised Statutes, 1961-1971, Ch. 120, §§ 349.1, 439.2 and 439.3.

### USE TAX ACT

AN ACT in relation to a tax upon the privilege of using tangible personal property in this State. Approved July 14, 1955, L. 1955, p. 2027; title as amended by act approved July 8, 1959. L. 1959, p. 654.

*Be it enacted by the People of the State of Illinois, represented in the General Assembly:*

**439.1 Title.]** § 1. This Act shall be known and may be cited as the "Use Tax Act".

**439.2 Definitions.]** § 2. "Use" means the exercise by any person of any right or power over tangible personal property incident to the ownership of that property, except that it does not include

**493.3 Tangible personal property purchased at retail — Use tax — Rate — Collection and remittance —Exemptions.]** § 3. A tax is imposed upon the privilege of using in this State tangible personal property purchased at retail from a retailer. Such tax is at the rate of 4¼% of the selling price of such property if purchased prior to October 1, 1969, and at the rate of 4% of the selling price of such property if purchased after September 30, 1969.

• • •

To prevent actual or likely multistate taxation, the tax herein imposed does not apply to the use of tangible personal property in this State under the following circumstances:

(a) The use, in this State, of tangible personal property acquired outside this State by a nonresident individual and brought into this State by such individ-

ual for his or her own use while temporarily within this State or while passing through this State;

(b) the use, in this State, of tangible personal property by an interstate carrier for hire as rolling stock moving in interstate commerce or by lessors under a lease of one year or longer executed or in effect at the time of purchase of tangible personal property to interstate carriers for-hire for use as rolling stock moving in interstate commerce as long as so used by such interstate carriers for-hire;

(c) the use, in this State, of tangible personal property which is acquired outside this State and caused to be brought into this State by a person who has already paid a tax in another State in respect to the sale, purchase or use of such property, to the extent of the amount of such tax so paid in such other State;

(d) the temporary storage, in this State, of tangible personal property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, is used solely outside this State or physically attached to or incorporated into other tangible personal property that is used solely outside this State.

## QUESTION PRESENTED FOR REVIEW

Is the imposition of the Illinois Use Tax upon an interstate air carrier's local activity of storage and withdrawal of aviation fuel measured by the volume of fuel that is withdrawn from storage and placed in the tanks of its aircraft violative of the Commerce Clause as set forth in Article I, Section 8, clause 3 of the United States Constitution and Due Process Clause of the Fourteenth Amendment?

## STATEMENT OF THE CASE

United Air Lines, Inc.[1] is doing business in Illinois. Primarily, it carries passengers and freight in interstate commerce to and from Chicago via O'Hare and Midway Airports. (A. 2, 56, 57; R. 039, 033). United purchases turbine fuel and aviation gas for its O'Hare and Midway operations from Shell Oil Co.,[2] pursuant to a general requirements contract. (R. 301). Since approximately 1953, Shell has delivered turbine fuel and aviation gas[3] to United by the following procedure.

Shell transports crude oil primarily from West Texas and Oklahoma to Wood River, Illinois, for processing and refining. (A. 128, 148-49; R. 212, 274-75). At Wood River, Shell produces turbine fuel. (A. 128, 148, 149; R. 212, 274-75). In addition to refining turbine fuel in Illinois, Shell barges already refined turbine fuel from Houston,

---

1. United Air Lines, Inc. is incorporated in Delaware, has its principal place of business in Cook County, Illinois, and is qualified to do and is doing business in Illinois.

2. Shell Oil Co. is incorporated in Delaware, designates its principal place of business as New York City, and is qualified to do and is doing business in the State of Illinois.

3. United purchases basically two types of aviation fuel from Shell. Turbine fuel, which is essentially kerosene, fires its jet planes, and 100 octane aviation gas propels its piston engine aircraft. (A. 139, R. 235). Of the two types of fuel purchased by United from Shell per month, aviation gas equals only 3-4% of the volume of turbine fuel. (R. 237). Although not explicitly established, the record supports the inference that the initial production and distribution of aviation gas by Shell to United is similar to that for turbine fuel. (A. 139; R. 235, 301).

Texas, or Norca, Louisiana, up the Mississippi River to Wood River, where it is stored until it may be simultaneously piped with the Wood River refined turbine fuel to East Chicago, Indiana. (A. 137-38, 147-50; R. 231-32, 268-69, 274-76). From Wood River, Shell transports its turbine fuel 250 miles through its own pipe lines to Shell storage facilities in East Chicago, Indiana. (A. 128, 148-49; R. 212-13, 274-75). No further processing or refining occurs at Shell's facilities in East Chicago, Indiana, merely filtering necessitated by the pipe line transfer. (A. 145-46; R. 259). The fuel remains in storage at East Chicago approximately 10-12 days (A. 129, 137; R. 213, 231) until requested for delivery by United. United has no employees at Shell's facilities in East Chicago. (A. 129, 163-64; R. 213, 323).

Generally once a month, United, through its agents, Lockheed Air Terminal and Butler Aviation, orders aviation fuel from Shell at East Chicago for delivery approximately three times the following month at O'Hare and Midway Air Terminals. (A. 129-30, 139-40; R. 213-14; 235-36). Lockheed Air Terminal acts as United's agent at O'Hare and Butler Aviation acts as agent for United at Midway. Aviation gas for United's operations at O'Hare and Midway is orally ordered from Shell by phone by Lockheed and Butler, respectively, and arranged for shipment by the same from East Chicago-Hammond on common carrier trucks owned by Rogers Trucking Co. (A. 138-39, 143-44, 157-60; R. 234-35, 254, 303-04, 306). This gas is stored at both O'Hare and Midway until needed for United's interstate and intrastate flights. (A. 174; R. 300-01, 350-51). Requests for turbine fuel from Midway and O'Hare by United's agents are generally in writing and sent to East Chicago on the 10th of each month. (A. 129-30, 157-58; R. 213-14, 303). Turbine fuel for Midway is

trucked by United via Rogers Cartage Company from East Chicago, and stored at Midway until needed for aircraft propulsion. (A. 145, 159-60, 174-75; R. 258, 306-07, 351).[4]

The delivery of turbine fuel for United's operations at O'Hare, the largest of United's operations, is somewhat more intricate. As noted previously, generally once a month, United's agent at O'Hare, Lockheed Air Terminal, will request, in writing, from Shell's storage facilities at East Chicago, turbine fuel for the following month's supply. Lockheed directs Shell at East Chicago to deliver the requested turbine fuel designed for O'Hare to the West Shore Pipe Line Fuel Company, a common carrier, at the connecting station between Shell and West Shore in Hammond, Indiana. (A. 130-31, 158-59, 179; R. 216, 238, 304, 363). Shell owns 20% of West Shore Pipe Line. (A. 131; R. 216-17). The turbine fuel is then shipped via the West Shore Pipe Line to storage facilities located in Des Plaines, Illinois, and owned by Shell, but leased by United. (A. 132-33; 140-41; R. 218-19; 243).[5] Lockheed Air Terminal manages the storage facilities at Des Plaines on a throughput basis; and, unless otherwise agreed by Shell, United

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4. Apparently neither Shell nor United takes an insurable interest in the turbine fuel and aviation gas shipped from East Chicago via Rogers Cartage Co. ultimately destined for United. (A. 132, 136, 158, 165, 168; R. 218, 225, 300, 301, 304, 327, 328, 332).

5. Shell's invoices for the turbine fuel going to O'Hare are based on the receiving meters of West Shore Pipeline at Hammond, Indiana. (A. 179; R. 363). The billing for the fuel is sent by Shell from Indianapolis, Indiana to United at Des Plaines, Illinois. United sends the payment for the fuel to Indianapolis, Indiana. (A. 131, 182; R. 217, 369).

must store Shell fuel at Des Plaines.[6] (A. 140, 146-47; R. 241-42, 243, 264-65). United shares its leased facilities at Des Plaines with American Airlines, who also orders turbine fuel from Shell at East Chicago for ultimate use at O'Hare airport. United's and American's fuel is commingled in storage at Des Plaines while awaiting transfer to O'Hare for its ultimate use. (A. 132-33, 135-36, 142-43; R. 219, 225, 247). The fuel stored at Des Plaines is subject to no further refining or processing except for the process of filtering necessitated by the pipeline transfer from East Chicago (A. 141, 168-69; R. 245, 333-34). From the storage facilities at Des Plaines, the turbine fuel is transferred to storage facilities at O'Hare by pipeline owned by Shell and leased to United and American Airlines. (A. 142-43, 168-69; R. 246, 333-34). At O'Hare Airport,[7] the turbine fuel flows into the primary tank farm area where the fuel is filtered once again. From the primary tank area, the fuel is piped to several satellite areas from which the fuel is either piped into refueler trucks for fueling aircraft, or piped directly through the hydrant systems onto the air craft. (A. 168-71; R. 333-41). All aviation fuel that is ultimately pumped onto United's aircraft at either O'Hare or Midway Airports and that is subject to the present litigation is either refined and/or stored by Shell at Wood River, Illinois, prior to its transfer by Shell to Shell's storage facilities at East Chicago, Indiana. (A. 147-49, 153-55, 156-57; R. 268-69, 274-75, 289-90, 292, 297-98, 300-01).

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6. United is self-insured on the fuel stored at Des Plaines, Illinois. (A. 165, 168; R. 327-28, 332).

7. O'Hare Airport is owned by the City of Chicago and the city leases its facilities at O'Hare to United and approximately fourteen other signatory airlines. (A. 169; R. 334).

From approximately August of 1955 until June 3, 1963, United paid to the State of Illinois without protest a use tax[8] on the aforementioned fuel purchase, delivery, and storage to the following extent:

> "(a) On all fuel consumed on flights originating within and terminating within Illinois (intra-state operations), and
>
> (b) On a portion of the fuel deemed to have been used and consumed (burned off) in Illinois on flights departing from Midway and O'Hare to points outside Illinois.
>
> • • •

(Plaintiff's Amended Complaint in Chancery — A. 1; R. 047).

Then, as now, the use tax was imposed upon the privilege of using in Illinois tangible personal property purchased at retail;[9] use being defined as the "exercise by any person of any right or power over tangible personal property incident to the ownership of that property . . ."[10] However, the Use Tax Act includes the following provision:

> To prevent actual or likely multistate taxation, the tax herein imposed shall not apply to the use of tangible personal property in this State under the following circumstances:
>
> (a) The use, in this State, of tangible personal property acquired outside this State by a nonresident individual and brought into this State by such individual for his or her own use while temporarily within this State or while passing through this State;
>
> (b) the use, in this State, of tangible personal property which is acquired outside this State, and which is

8. Ill. Rev. Stat. 1955-1963, Ch. 120, §§439.1, et seq.

9. Ill. Rev. Stat. 1955-1963, Ch. 120, §439.3.

10. Ill. Rev. Stat. 1955-1963, Ch. 120, §439.2.

moved into this State for use as rolling stock moving in interstate commerce;

(c) the use, in this State, of tangible personal property which is acquired outside this State and caused to be brought into this State by a person who has already paid a tax in another state in respect to the sale, purchase or use of such property, to the extent of the amount of such tax so paid in such other state;

(d) the temporary storage, in this State, of tangible personal property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, is used solely outside this State or physically attached to or incorporated into other tangible personal property that is used solely outside this State.

(Ill. Rev. Stat. 1955-1963, ch. 120, § 493.3, unnumbered paragraph 6)

From 1955 through June 3, 1963, the temporary storage exception noted in sub-section (d) above was construed by the Illinois Department of Revenue to impose a use tax on fuel temporarily stored in Illinois only to the extent it was actually consumed or burned in or over Illinois. However, on June 3, 1963, due to its belief that it had been misapplying the temporary storage exception in sub-section (d) (A. 121-22; R. 190-91), the Department of Revenue issued a Bulletin that provided in pertinent part:

"... temporary storage ends and a taxable use occurs when the fuel is taken out of storage and placed into the tanks of the airplanes, railroad engine or truck. At this point the fuel is converted into its ultimate use, and, therefore a taxable use occurs in Illinois. If a common carrier does not have separate facilities for transferring the fuel out of the State of Illinois, but always puts it into the tank of the air-

plane, railroad engine or truck for final consumption, then they no longer will be able to give a certificate to the vendor stating that the fuel is purchased within the temporary storage provisions of the Use Tax Act, but must pay the use tax to their supplier."[11]

*United Air Lines, Inc.* v. *Mahin, et al.*, 49 Ill. 2d 45, 48-49; 273 N.E. 2d 585, 586-87 (1971).

On September 25, 1963, United filed its Amended Complaint in Chancery in the Circuit Court of Cook County claiming that the imposition of the use tax on the placing or loading of the fuel into the tanks of aircraft departing on interstate journeys would be violative of the Commerce and Due Process clauses of the Constitution of the United States. In the alternative, United alleged that only that portion of the Illinois-laden fuel actually burned within the State by the departing aircraft could be constitutionally subjected to a state use tax. (A. 1-17; R. 038-058).

Prior to trial, the parties stipulated that all aviation fuel subject to the pending litigation:

". . . is purchased by United from Shell Oil Company, and is delivered to United, with possession, title and all risk of loss passing to United, either at Hammond, Indiana or at East Chicago, Indiana.

All such fuel is thereafter transported by pipeline or tank trucks, by common carriers under contract to United, normally on a daily basis, to ground fuel storage facilities located within Illinois, on or near O'Hare or Midway Airports in Chicago, where it is stored prior to being transferred to the fuel storage tanks of aircraft. The period of storage in such ground fuel storage facilities ranges from a minimum of two days (during which period jet fuel is processed to

11. The validity of requiring Shell to collect the tax is not in issue before this Court. (A. 5; R. 043).

> eliminate impurities) to a maximum of twelve days. The average period of storage ranges, depending on the type of fuel and storage facilities involved, from two and a half to six days." (A. 38; R. 104).

However, the parties further stipulated and agreed that all of the parties hereto shall have the right to offer additional evidence on any matter relevant to the subject matter of this litigation. (A. 45; R. 147).

On February 14, 1968, the trial court entered an order enjoining the Department of Revenue from imposing or collecting "a use tax upon any fuel loaded into plaintiff's aircraft in Illinois during the period prior to July 1, 1963." (A. 47; R. 151-52). The State did not appeal this order. On December 23, 1968, the trial court entered an order in favor of the Department of Revenue and other defendants and directed United in the event of an appeal, to continue payment of its use tax liability into the protest fund established for them pending the final determination of this litigation.[12] (A. 189-90).

On appeal, a majority of the Supreme Court of Illinois upheld the validity of the use tax as applied to United and interpreted the temporary storage provision of the statute by concluding:

> "To put it another way, the legislature has stated that the temporary storage and the withdrawal therefrom are not taxable uses, if the property in question is to be used solely outside the State. It is clear that if United was to withdraw its fuel from storage at Des Plaines and the airports and transport it outside the State for use elsewhere, as for example at an airport in nearby Wisconsin, the exemption would apply and neither the storage, nor the withdrawal, nor the transportation of the fuel outside the State would

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12. Approximately 8 million dollars is presently being held in the protest fund, representing the tax liability of United to the State of Illinois from 1963 to the present.

be uses subject to the tax. But United does not store in Illinois with any intention that the fuel will be used solely outside this State. Rather, the fuel is stored here only to facilitate United's operations from the O'Hare and Midway airports within the State. Under the circumstances, the 'storage' becomes something more than a 'temporary storage' for safekeeping prior to its use solely outside of Illinois. Such storage, under the plain words of the statute, does not qualify under the temporary storage exemption and, as the authorities already discussed reveal, either the storage itself or the withdrawal therefrom are uses which may be taxed without offending the commerce clause of the Federal constitution." (A. 202).

## SUMMARY OF ARGUMENT

The storage and withdrawal of fuel by United Airlines under the present facts is a local taxable event supporting a non-discriminatory state use tax.

When the Illinois Use Tax is based upon the taxable event of storage and withdrawal, or, storage, withdrawal from storage and installation, the state tax is levied upon a substantial local activity that should bear its fair share of local government costs.

The imposition of the Illinois Use Tax upon United's local activities of storage and withdrawal, or storage, withdrawal from storage and installation, does not discriminate against interstate commerce by either (1) imposing the tax solely upon interstate enterprises, or (2) levying the tax upon interstate commerce at a higher rate, or (3) subjecting interstate commerce to the danger of "multiple tax burdens."

Since the facts reveal that the purchase of the aviation fuel in question by United Airlines from Shell Oil Company is basically an Illinois sale to an Illinois buyer that would support a sales tax upon the purchaser, the imposition of the present non-discriminatory use tax upon United (purchaser) is valid.

## ARGUMENT

### I.

### THE STORAGE AND WITHDRAWAL OF FUEL BY UNITED AIRLINES UNDER THE PRESENT FACTS IS A LOCAL TAXABLE EVENT SUPPORTING A NON-DISCRIMINATORY STATE USE TAX.[13]

"While it is true that a State may not erect a wall around its borders preventing commerce an entry, it

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13. A brief analysis of the genesis of the state use and storage and withdrawal taxes provides an interesting perspective of the historical maneuvers between interstate commerce and state taxation. At an early point in commerce clause development, it was established that a state could not tax property in interstate transit. And until about 1940, it was generally accepted that an interstate sales transaction was similarly immune from state taxation. Couple the two former principles with the teachings of Helson v. Kentucky, 279 U.S. 245 (1928), which exempted from state taxation the use of articles consumed in interstate transportation, and there existed the opportunity for interstate businesses to avoid local taxation by manipulating purchases of goods so as to constitute interstate sales. Apparently, this happened. Large enterprises doing business in interstate commerce would purchase goods through an interstate sale and have the goods delivered to their state of use where the goods would be stored and withdrawn as needed for utilization in interstate commerce. In this manner, the interstate enterprises became both a purchaser in interstate commerce as well as an ultimate user of goods in interstate commerce and, at one point, enjoyed substantial freedom from state taxation. The aforementioned practice gave birth to the state use and storage and withdrawal taxes, with the intention of removing the tax immunity from goods halted for storage purposes between two segments of interstate com-

is axiomatic that the founders did not intend to immunize such commerce from carrying its fair share of the costs of the state government in return for the benefits it derives from within the State."

*Northwestern States Portland Cement Co.* v *Minnesota*, 358 U.S. 450, 461-62 (1959).

## A.

**When The Illinois Use Tax Is Based Upon The Taxable Event Of Storage And Withdrawal, Or Storage, Withdrawal From Storage and Installation, The State Tax Is Levied Upon A Substantial Local Activity That Should Bear Its Fair Share of Local Government Costs.**[14]

This Court has "handed down [over] three hundred full dress opinions" dealing with the constitutionality of state tax measures when challenged pursuant to the Due

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merce. *See,* Warren and Schleslinger, *Sales and Use Taxes: Interstate Commerce Pays Its Way,* 38 COLUM. L. REV. 49, 55 (1938); Hartman, *Sales Taxation In Interstate Commerce,* 9 VAND. L. REV. 138, 161 (1956).

As of 1969, 45 states have enacted some form of use tax. *The Compensating Use Tax and Its Effect on Multistate Business.* 20 CASE W. RES. L. REV. 597, 599 (1969).

14. Foreign corporations may utilize many economic factors available within a State including (1) labor supply; (2) conveniences of the local market; (3) buildings and other property; (4) power; (5) transportation facilities; (6) financial aid; (7) applicability of home management; (8) raw materials; and (9) the local public services, such as education, roads, and police and fire protection. See Sufrin, *Tax Incentives and Industrial Location,* 10 SYRACUSE L. REV. 21 (1959).

Process or Commerce clause,[15] producing what this Court itself has described as a "quagmire" of decisions that have not "always [been] clear . . . consistent or reconcilable." *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 457-58 (1959). However, from this voluminous and complex litigation some general principles apparently remain unquestioned.

Although at one time a sharp controversy existed concerning whether the Commerce Clause of its own force impliedly prohibited state regulation or taxation of interstate commerce, or whether the states were free to regulate and tax interstate commerce unless explicitly precluded by

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15. "The need for national economic unity unaffected by state borders and untrammeled by discriminatory and retaliatory state action against commerce from sister states was one of the chief reasons for abandoning the Articles of Confederation and adopting our federal constitution which entrusted Congress with the power to regulate interstate commerce. Two chief weaknesses of the Articles of Confederation were said to be the absence of power in Congress to regulate foreign and interstate commerce, and the presence of power in the states to do so. The almost catastrophic results flowing from this unfortunate situation were harmful reprisals and trade wars at home among the states, as well as the utter inability of the states to present a united front to foreign nations. The necessity for remedying these weaknesses, if the young Republic was to survive as a nation, appears to have been the primary reason for abandoning the Confederation and forming the Constitution. The dismal experience under the Confederation served to unite the members of the Constitutional Convention in the conviction that some branch of the federal government should possess the power to regulate commerce among the states and with foreign nations."

Hartman, *State Taxation of Interstate Commerce: A Survey and an Appraisal*. 46 VA. L. REV. 1053-54 (1960).

congressional action,[16] today it appears an established doctrine that the Commerce Clause of its own force is a limitation on the states' power to regulate or tax interstate commerce, and the failure of Congress "to act on the subject in the area of taxation nevertheless requires that interstate commerce shall be free from any direct restrictions or impositions by the State[s]." *Northwestern States Portland Cement Co., supra,* at 427. In deference to the aforementioned, it has been clearly articulated that a state may not tax the "privilege" of engaging in interstate commerce, *Spector Motor Service, Inc.* v. *O'Connor,* 340 U.S. 602 (1951),[17] or allow "one single tax worth of direct interference with the free flow of commerce." *Freeman* v. *Hewitt,* 329 U.S. 249, 256 (1946). Nor may a State impose a tax which discriminates against interstate commerce either by exempting local goods from the tax leaving only interstate business subject to the imposition, *I. M. Darnell & Son Co.* v. *City of Memphis,* 208 U.S. 113 (1908);

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16. *Compare* Brown v. Maryland, 25 U.S. (12 Wheat) 419, 449 (1827) (Marshall, J.) *with* Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851) (Curtis, J.) *and* the foregoing *with* Welton v. Missouri, 91 U.S. 275, 282 (1875); Philadelphia & So. S.S. Co. v. Pennsylvania, 122 U.S. 326, 336 (1887); Robbins v. Shelby County Taxing Dist., 120 U.S. 489, 492-93 (1887).

17. *Accord,* Anglo-Chilean Nitrate Sales Corp. v. Alabama, 288 U.S. 218 (1933); Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203 (1925); and Ozark Pipe Line Corp. v. Monier, 266 U.S. 555 (1925). Although the state tax in each of these cases appeared to be fairly measured relative to the taxpayer's business connections within the taxing state, it was void as a privilege tax. *See also,* Roeskin, *The Impact of the Spector Decision,* 29 TAXES 523.

*Walling* v. *Michigan*, 116 U.S. 446 (1886); or, subjecting nonresident businesses to a higher tax rate than local businesses, *Memphis Steam Laundry Cleaner, Inc.* v. *Stone*, 342 U.S. 389 (1952); or, by subjecting interstate commerce to the burden of "multiple taxation." *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U.S. 434 (1939). In applying one or more of the above articulated principles, historically, this Court has defined the scope of the protection afforded by the Commerce Clause to include the actual movement of commerce itself across state lines,[18] taxes upon the privilege of engaging in various interstate activities,[19] situations in which local taxes were levied on re-

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18. Case of the State Freight Tax, 82 U.S. (15 Wall.) 232 (1872); Coe v. Errol, 116 U.S. 517 (1886); Hughes Bros. Timber Co. v. Minnesota, 272 U.S. 469 (1926); and Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954).

19. *UPON BUSINESSES EXCLUSIVELY INTERSTATE*: Railway Express Agency, Inc. v. Virginia, 347 U.S. 359 (1954); State Tax Comm'n. v. Interstate Natural Gas Co., 284 U.S. 41 (1931); Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602 (1951).

*UPON BUSINESSES MIXING LOCAL AND INTERSTATE COMMERCE*: Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389 (1952); Texas Transport & Terminal Co. v. New Orleans, 264 U.S. 150 (1924).

*UPON THE OCCUPATION OF SELLING GOODS SHIPPED THROUGH INTERSTATE COMMERCE CHANNELS*: Robbins v. Shelby County Taxing District, 120 U.S. 489 (1887); Nippert v. City of Richmond, 327 U.S. 416 (1946); Heyman v. Hays, 236 U.S. 178 (1915); Rearick v. Pennsylvania, 203 U.S. 507 (1906); Crew Levick Co. v. Pennsylvania, 245 U.S. 292 (1917).

ceipts derived from interstate transactions,[20] and, taxes levied on the means and instrumentalities of interstate commerce that were considered an integral part of that interstate commerce.[21]

Although the Court in fashioning commerce clause protection, has been concerned with protecting the right of access to state economies by interstate commerce and fostering the efficient allocation of the resources of our national economy,[22] it also has realized that "the power of taxation is indispensable to [the state's] existence." *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 199 (1824).

> "The recurring problem [for the Court has been] to resolve [the] conflict between the Constitution's mandate that trade between the states be permitted to flow freely without unnecessary obstruction from any source, and the states' rightful desire to require that interstate business bear its proper share of the costs of local government in return for benefits received."[23]

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20. Joseph v. Carter & Weeks Stevedoring Co., 330 U.S. 422 (1947); Freeman v. Hewitt, 329 U.S. 249 (1946); and Philadelphia & So. S.S. Co. v. Pennsylvania, 122 U.S. 326 (1887); J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938).

21. Puget Sound Stevedoring Co. v. State Tax Comm'r., 302 U.S. 90 (1937); New Jersey Bell Tel. Co. v. State Bd. of Taxes, 280 U.S. 338 (1930); Ozark Pipe Line Corp. v. Monier, 266 U.S. 555 (1925); Helson v. Kentucky, 279 U.S. 245 (1929).

22. General Motors Corp. v. Washington, 377 U.S. 436, 460 (1964); (Goldberg, Stewart and White, JJ., dissenting); *See also*: *State Taxation of Multistate Businesses*, 74 YALE L. J. 1260, 1271 (1965).

23. In recent years, it appears that state tax collectors have had difficulty in keeping pace with state expenditures due to the various demands for additional govern-

*Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 166 (1954).

In attempting to accommodate between the revenue needs of the states and the competing national need for commercial freedom,[24] this Court has permitted states to tax interstate commerce or activities related thereto in basically two forms: (1) state taxes that are actually tolls exacted for the privilege of using state facilities;[25] and, (2) taxes on local activities deemed sufficiently removed from the interstate commerce itself.[26] Initially, it is the State's

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mental services, coupled with the spiralling governmental costs due to inflation. *See*, Hartman, *State Taxation of Interstate Commerce: A Survey and an Appraisal*, 46 VA. L. REV. 1051-52 (1960) and the U.S. BUREAU OF THE CENSUS, DEPT. OF COMMERCE, COMPENDIUM OF GOVERNMENT FINANCES (1967).

24. These two policy considerations hardly permit an absolutely logical or philosophical reconciliation but the dilemma apparently does permit the fashioning of a relatively practical, workable balance.

25. Tolls: *e.g.*, Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc., —— U.S. ——; 92 S. Ct. 1349 (1972); Capitol Greyhound Lines v. Brice, 339 U.S. 542 (1950).

26. Local Activity: *e.g.*—

A. *SALES AND USE TAXES APPLIED TO ARTICLES USED IN INTERSTATE COMMERCE*

1. Local sales taxes:
   Eastern Air Transport, Inc. v. South Carolina Tax Commission, 285 U.S. 147 (1932).
2. Storage and use taxes:
   (a) before interstate movement;
   Federal Compress & Warehouse v. McLean, 291 U.S. 17 (1934); *cf.*,

position that the tax presently challenged is a tax upon a substantially local activity of United that is lawfully imposed since it does not discriminate against interstate commerce.

The Supreme Court of Illinois assumed the following facts:

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Chassaniol v. Greenwood, 291 U.S. 584 (1934); Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1923).

(b) after interstate movement;
Monamotor Oil Co. v. Johnson, 292 U.S. 86 (1934).

(c) break in transit;
Nashville, Chattanooga & St. Louis Ry. v. Wallace, 288 U.S. 249 (1933); Edelman v. Boeing Air Transport, Inc., 289 U.S. 249 (1933); Southern Pacific Co. v. Gallagher, 306 U.S. 167 (1939); Pacific Tel. & Tel. Co. v. Gallagher, 306 U.S. 182 (1939); Independent Warehouses, Inc. v. Scheele, 331 U.S. 70 (1947).

B. *USE TAX ON LOCAL PRIVILEGE OF USING GOODS AFTER INTERSTATE PURCHASE*

Henneford v. Silas Mason Co., 300 U.S. 577 (1937).

C. *VARIOUS PRIVILEGE TAXES IMPOSED UPON FOREIGN CORPORATIONS UTILIZING LOCAL MARKETS*

1. Exercising a corporate franchise:
Maine v. Grand Trunk Ry., 142 U.S. 217 (1891).

2. Existing as a domestic corporation:
New York *ex rel.* Cornell Steamboat Co. v. Sohmer, 235 U.S. 549 (1915); Ashley

". . . United purchases and takes delivery of the aviation fuel in question from Shell Oil Company at facilities of the latter located in Hammond and East Chicago, Indiana. Thereafter, United transports it by common carrier pipeline and trucks to its underground storage facilities at O'Hare and Midway airports in Illinois. Fuel transported by pipeline is first

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v. Ryan, 153 U.S. 436 (1894).

3. Manufacturing, production and extraction of Natural Resources:

   American Mfg. Co. v. St. Louis, 250 U.S. 459 (1919) (manufacture of goods for sale); Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1923) (mining); Hope Natural Gas Co. v. Hall, 274 U.S. 284 (1927) (removal of natural gas); Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932) (generation of electrical power).

4. Sales and business transactions measured by gross receipts:
   McGoldrich v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940); and its companion cases, McGoldrich v. Compagnie Generale Transatlantique, 309 U.S. 430 (1940); Jagels, "A Fuel Corporation" v. Taylor, 309 U.S. 619 (1940); McGoldrich v. Felt & Tarrant Mfg. Co., 309 U.S. 70 (1940) (transfer of possession to the purchaser); International Harvester Co. v. Dep't. of Treasury, 322 U.S. 340 (1944); Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938) (tax on occupation of publication of newspapers and magazines measured by gross receipts from the sale of advertising); Dep't. of of Treasury v. Wood Preserving Corp., 313 U.S. 62 (1941) (sale and delivery taxable event); International Harvester Co. v. Dep't. of Treasury, 322 U.S. 340

placed in storage tanks at Des Plaines, Illinois, and from there, as needed, is piped to the underground facilities. It remains in the latter only so long as necessary for certain purification processes, and from there is pumped into the tanks of United's aircraft, almost always immediately prior to departure time. United pays the tax on fuel used in intrastate flights, training flights and the like, and the dispute here relates only to fuel loaded on planes departing on interstate or foreign flights." (A. 194).

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(1944) (various sales constituted local transaction serving as taxable event); *cf.* State Tax Comm'n. of Utah v. Pacific State Cast Iron Pipe Co,. 372 U.S. 605 (1963); International Harvester v. Evatt, 329 U.S. 416 (1947) (tax upon privilege of doing business within state measured by gross receipts from interstate sales of manufactured articles); Norton Co. v. Dep't. of Revenue, 340 U.S. 534 (1951) (tax on occupation of selling measured by gross receipts where the local office either received the order or distributed the goods); Ford Motor Co. v. Beauchamp, 308 U.S. 331 (1939) (annual franchise tax on corporations measured by allocation formula); General Motors Corp. v. Washington, 377 U.S. 436 (1964) (tax on privilege of engaging in business activities within the state measured by gross wholesale sales).

D. *"SUBSTANTIAL INCOME PRODUCING ACTIVITY" — SUPPORTING AN APPORTIONED STATE NET INCOME TAX*

Northwestern States Portland Cement Co. v. State of Minnesota, 358 U.S. 450 (1959).

In construing the issue, the Court stated:

". . . Immediately after the enactment of the Use Tax Act in 1955, the Department of Revenue uniformly and consistently interpreted and applied the Act to these carriers in such a manner that the incidence and measure of the tax was taken to be only that portion of the fuel consumed in or over Illinois. This construction has been commonly referred to as the 'burn off' rule and, during the period of its application, provoked no amendatory legislation. Eight years later, on June 3, 1963, the Department abruptly changed its interpretation and issued a bulletin which announced:

'The Department's position is that temporary storage ends and a taxable use occurs when the fuel is taken out of storage and placed into the tanks of the airplanes, railroad engine or truck. At this point the fuel is converted into its ultimate use, and, therefore, a taxable use occurs in Illinois.

'If a common carrier does not have separate facilities for transferring the fuel out of the State of Illinois but always puts it into the tank of the airplane, railroad engine or truck for final consumption, then they no longer will be able to give a certificate to the vendor stating that the fuel is purchased within the temporary storage provisions of the Use Tax Act, but must pay the Use Tax to their supplier.'

In short, under this construction all fuel loaded on United's planes at the two airports was deemed to measure the tax, and the exemption in question was construed as having application only if the temporarily stored fuel is transported out of the state for use elsewhere by some means other than placing it in equipment which would consume it."

* * *

"The Use Tax Act, which went into effect in August, 1955, (Laws of 1955, p. 2027), imposes a tax on the privilege of using in this State tangible personal property that was purchased elsewhere, and was de-

signed to complement the Retailers' Occupation Tax Act, (Laws of 1933, p. 924), under which a tax is imposed upon persons engaged in the business of selling tangible personal property to purchasers for use and consumption. It has been found to be constitutional (*Turner* v. *Wright,* 11 Ill. 2d 161), and it is settled that the Use Tax Act was enacted for the valid purposes of preventing evasion of retailers' occupation tax by persons making out-of-state purchases of tangible personal property for use in Illinois, and of protecting Illinois merchants against diversion of business. At issue here, a matter of first impression, is the construction and application of that portion of section 3 of the Act which, from its inception in 1955, has provided for an exemption from the tax in these terms: 'To prevent actual or likely multistate taxation, the tax herein imposed shall not apply to the use of tangible personal property in this State under the following circumstances: * * * (d) the temporary storage, in this State, of tangible personal property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, is used solely outside this State * * *.'" Ill. Rev. Stat. 1955, ch. 120, par. 439.3. (A. 193-95).

United submitted alternative arguments. Initially it suggested that the taxing statute should be construed to measure the tax solely by the amounts of fuel consumed by United's interstate flights in and over Illinois. In support thereof, it was postulated that the placing and presence of fuel in departing planes is but a continuation of temporary storage and that the burning of fuel in and over Illinois is simultaneous consumption terminating temporary storage. (A. 198). In the alternative, United insisted that the state legislature waived the right to tax either storage or withdrawal by enacting the temporary storage provision and that the present taxable incident

falls upon the loading of aircraft which is an integral activity of interstate commerce. (A. 201). The state contended that the taxable use occurs when United withdraws its fuel from storage and places it in its planes. (A. 201). The Supreme Court of Illinois upheld the tax, and as previously set out, did so upon the following rationale:

> "Our own statute defines a taxable 'use' as being 'the exercise by any person of any right or power over tangible personal property incident to the ownership of such property' (Ill. Rev. Stats. 1961 and 1969, ch. 120, par. 439.2)."

and:

> "In language which we find to be plain, simple and unambiguous, the Act has granted exemption to 'the temporary storage, in this State, of tangible personal property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, *is used solely outside this State.*' (Emphasis added.) Exemption is thus granted only as to tangible personal property which is stored here temporarily and which, upon withdrawal from storage, is to be used solely outside Illinois. To put it another way, the legislature has stated that the temporary storage and the withdrawal therefrom are not taxable uses, if the property in question is to be used solely outside the State. It is clear that if United was to withdraw its fuel from storage at Des Plaines and the airports and transport it outside the State for use elsewhere, as for example at an airport in nearby Wisconsin, the exemption would apply and neither the storage, nor the withdrawal, nor the transportation of the fuel outside the State would be uses subject to the tax. But United does not store in Illinois with any intention that the fuel will be used solely outside this State. Rather, the fuel is stored here only to facilitate United's operations from the O'Hare and Midway airports within the State. Under the circum-

> stances, the 'storage' becomes something more than a 'temporary storage' for safekeeping subsequent to its use solely outside of Illinois. Such storage, under the plain words of the statute, does not qualify under the temporary storage exemption and, as the authorities already discussed reveal, either the storage itself or the withdrawal therefrom are uses which may be taxed without offending the commerce clause of the Federal constitution." (A. 202).

On the basis of the above language, the taxable incident in this cause can reasonably be construed to be either storage and withdrawal; or storage, withdrawal from storage and conversion to ultimate use, both measured by the amount of gas that has been stored in Illinois and withdrawn to be loaded upon United's aircraft at O'Hare and Midway. Under either interpretation, the tax is valid.

Under the Use Tax Act, the Illinois legislature provides enterprises doing business in interstate commerce with an exemption which by its very nature is not available to solely intrastate concerns. The exemption merely establishes that the otherwise taxable use of storage and withdrawal of personal property acquired outside Illinois and brought within the state is not taxable in Illinois if one does not otherwise, other than storage and withdrawal, use the property stored in Illinois. However, if one does otherwise use the property stored and withdrawn in Illinois, the storage and withdrawal is no longer exempt but is a taxable use. Within this setting, the additional use, be it installation or consumption, that triggers the abolition of the exemption is not the taxable event nor the measure. However, even if the taxable event is interpreted to include storage, withdrawal from storage, and installation of the fuel that ultimately propels the aircraft, the principles enunciated by this Court validate the tax.[27]

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27. United has argued that the imposition of the present use tax is against interstate commerce since it has

This Court has upheld state use taxes upon property within its borders at three different intervals — before the personal property starts its interstate movement,[27] after the movement ends,[28] and, in certain circumstances, dur-

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been "denied the usual benefits of the temporary storage provision solely because the fuel in question is stored in Illinois to facilitate United's interstate operations." (App't. Br. p. 18). The conceptual emphasis of United's argument is misplaced. "Catchwords and labels, such as the words [interstate commerce] are subject to the dangers that lurk in metaphors and symbols, and must be watched with circumspection lest they put us off our guard." Henneford v. Silas Mason Co., 300 U.S. 577, 586 (1936). The temporary storage exemption was enacted for the benefit of those enterprises who acquire tangible personal property outside the state and who store these goods in Illinois and subject these goods to no other uses within Illinois. The operation of the abolition of the exemption falls equally upon those doing intrastate and interstate business. In effect, beginning in June of 1963, the state began imposing a use tax upon the full measure of fuel stored and withdrawn by United within Illinois. Previously, the State could have lawfully taxed the fuel but had not seen fit to do so. As this Court has stated:

> "A taxing act is not invalid because its exemptions are more generous than the state would have been free to make them by exerting the full measure of her power." *Id.* at p. 587.

28. Federal Compress & Warehouse Co. v. McLean, 291 U.S. 17 (1934); Coe v. Errol, 116 U.S. 517 (1885); Diamond Match Co. v. Village of Ontonagon, 188 U.S. 82 (1903).

29. Monamotor Oil Co. v. Johnson, 292 U.S. 86 (1934); Woodruff and Parker v. Parkham, 75 U.S. (8 Wall.) 123 (1869); *cf.* Pittsburgh & Southern Coal Co. v. Bates, 156 U.S. 577 (1891).

ing a break in the interstate movement.[30] On several occasions, this Court has had the opportunity to examine the situation in which hard goods or fuels have been transported interstate, then stored by the taxpayer in the taxing state while awaiting further use or consumption.

In *Nashville, Chattanooga & St. Louis Ry.* v. *Wallace,* 288 U.S. 249 (1933), Tennessee levied a "privilege tax" upon the storage of gasoline within the state and its withdrawal from storage for use or sale. The taxpayer was an interstate rail carrier purchasing large quantities of gasoline outside Tennessee and transporting it into the state in tank cars, from which it unloaded and placed the fuel in storage tanks. All of the fuel was withdrawn and

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30. Independent Warehouses, Inc. v. Scheele, 331 U.S. 70 (1947); General Oil Co. v. Crain, 209 U.S. 211 (1907); Bacon v. Illinois, 227 U.S. 504 (1912). Justice Hughes in Minnesota v. Blasius, 290 U.S. 1, 9-10 (1933), concluded that property which has come to rest within a state and is being held at the pleasure of the owner, for disposal or use, as his interest dictates, is part of the general mass of property within the state and is subject to the state's taxing power. However, the Court did note that if the interstate movement had begun, it may be regarded as continuing, despite temporary interruptions due to the "necessities of the journey or for the purpose of safety and convenience in the cause of movement." The concepts of "the pleasure of the owner" and "necessities of the journey or for the purpose of safety and convenience" are not mutually exclusive. And the fact that a particular break in transit provides safety and convenience should not preclude the conclusion that the goods are held for business reasons at the pleasure of the owner that secures some "independent local advantage". Compare the Court's division on the purpose of stoppage in Independent Warehouses, Inc. v. Scheele, *supra,* with General Oil Co. v. Crain, *supra.*

used by it as a source of motive power in interstate railway operations. The taxpayer challenged the imposition of the tax on the basis that it was imposed on the gasoline while still a subject of interstate commerce, and also, on the basis that in effect it was a tax upon the use of gasoline in appellant's business. In upholding the tax, Justice Stone concluded:

> "The power to tax property, the sum of all the rights and powers incident to ownership, necessarily includes the power to tax its constituent elements. See Bromley v. McCaughn, 280 U.S. 124, 136-138, 74 L. ed. 226, 229, 230, 50 S. Ct. 46. Hence, there can be no valid objection to the taxation of the exercise of any right or power incident to appellant's ownership of the gasoline, which falls short of a tax directly imposed on its use in interstate commerce, deemed forbidden in Helson v. Kentucky, 279 U.S. 245, 73 L. ed. 683, 49 S. Ct 279, supra. Here the tax is imposed on the successive exercise of two of those powers, the storage and withdrawal from storage of the gasoline. Both powers are completely exercised before use of the gasoline in interstate commerce begins. The tax imposed upon their exercise is therefore not one imposed on the use of the gasoline as an instrument of commerce and the burden of it is too indirect and remote from the function of interstate commerce itself to transgress constitutional limitations. See Eastern Air Transport v. Tax Commission, 285 U.S. 147, 76 L. ed. 673, 52 S. Ct. 340.
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> Appellant objects that the tax violates the Fourteenth Amendment in that it is levied as a charge for the use of the highways which appellant does not use. But the levy is a tax, not a toll or charge for use of the highways, see Carley & Hamilton v. Snook, 281 U.S. 66, 74 L. ed. 704, 50 S. Ct. 204, 68 A.L.R. 194, and the constitutional power to levy taxes does not depend upon the enjoyment by the taxpayer of any special benefit from the use of the funds raised by

taxation. Carley & Hamilton v. Snook, supra; St. Louis & S. W. R. Co. v. Nattin, 277 U.S. 157, 159, 72 L. ed. 830, 831, 48 S. Ct. 438." *Id.* at 268-69.

In *Edelman* v. *Boeing Air Transport*, 289 U.S. 247 (1933), Wyoming imposed a "license tax" upon the use of gasoline within the state. The taxpayer maintained an air service for the transportation of passengers, mail and express in interstate commerce. It purchased gasoline both within and without the state which it intermingled and stored in tanks at the two airports. The taxpayer contended that the state could not validly apply the use tax to the gasoline imported from outside the state, stored in tanks at the airport and used for "filling" the interstate planes in which it was eventually consumed. The tax was applied to the stored gasoline as it was withdrawn from the storage tanks at the airport and placed in the planes. The Court upheld the tax upon the theory that a state may validly tax the use to which gasoline is put in withdrawing it from storage within the state and placing it in the tanks of the planes, notwithstanding that its ultimate function is to generate motive power for carrying on interstate commerce. *Id.* at 252. *Accord, American Airways, Inc.* v. *Wallace*, 287 U.S. 565 (1932); *American Airways, Inc.* v. *Grosjean*, 3 F. Supp. 995 (E.D. La. 1933).

In *Wallace*, the statute was labelled a storage and withdrawal tax. In *Edelman*, the language used by the state court was that of a use tax. Both statutes appeared to be of the same nature and designed to reach the same event. The use tax coupled together with a storage tax in the same California statute was upheld in two subsequent cases.

In *Southern Pacific Co.* v. *Gallagher*, 306 U.S. 167 (1939), California applied a storage and use tax upon railroad

equipment and supplies purchased outside and brought into the taxing state for use in the operation of an interstate railroad. Few, if any, of the supplies were stored for long term needs. And, to avoid delay and cost, the movement from loading to final placement was as nearly continuous as managerial efficiency could contrive. All purchases were dedicated to the consumption in the taxpayer's interstate transportation business. Despite the former, this Court found a permissible taxable event when the articles "had reached the end of their interstate transportation and had not begun to be consumed in interstate operation." During this break "[a]t that moment, the tax on storage and use — retention and exercise of a right of ownership, respectively — was effective." In addition, the court noted that " 'practical continuity' does not always make an act a part of interstate commerce." *Id.* at 177.

In *Pacific Telephone & Telegraph Co.* v. *Gallagher*, 306 U.S. 182 (1939), the taxpayer operated a telephone and telegraph system in interstate and intrastate commerce. It purchased outside California substantial quantities of equipment, apparatus, material and supplies that were shipped to it in interstate commerce at various points within the state. The articles were stored pending use for installation and repairs of the communications system. This Court upheld the imposition of the California storage and use tax upon the taxpayer by concluding:

> "The appellant exercises two rights of ownership in California — retention and installation — after the termination of the interstate shipment and before the use or consumption on its mixed interstate and intrastate telephone system." *Id.* at 187.

In the present case, the state court premised its decision upon the fact that United purchases and takes delivery of the aviation fuel in question in Indiana. Thereafter, United

transports the aviation gas going to O'Hare and the aviation gas and turbine fuel going to Midway by common carrier trucks to its underground storage facilities at O'Hare and Midway airports in Illinois. Turbine fuel designed for O'Hare is first piped to storage tanks at Des Plaines, Illinois, and from there, is piped to United's underground facilities at O'Hare. The stored fuel is subject to no further refining or processing except for the process of filtering necessitated by the common carrier transfer from Indiana. (A. 194). The fuel is stored on the average of two-and-one-half to six days. (A. 38). United not only holds this fuel at its own pleasure, it leases the Des Plaines storage area to further its own business advantage. (R. 371-74). The fuel is removed from storage and placed on aircraft for the purpose of its ultimate consumption in supplying motive power for interstate transportation. On the basis of these facts, whether United's taxable event is construed to be storage and withdrawal, or storage, withdrawal from storage, and conversion to ultimate use (installation), measured[31] by the amount of fuel that has been stored

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31. It is well established that if a tax is imposed upon a subject within the permissible taxing power of the state, it will not be condemned because of the measure. This Court has stated that the "validity of the tax can in no way be dependent upon the mode which the state may deem fit to adopt in fixing the amount." Home Ins. Co. v. New York, 134 U.S. 594, 600 (1890). However, on several occasions, this Court has used language that indicates that the state designated measure was an infringement of the commerce clause. New Jersey Bell Tel. Co. v. State Board of Taxes, 280 U.S. 338 (1930); Gwin, White & Prince v. Henneford, 305 U.S. 434 (1939). Whether the Court treated the alleged measure of the tax as really the operating incident or merely invalidated the

in Illinois and withdrawn to be loaded upon United's aircraft in Illinois, the cases of *Nashville* (storage and withdrawal), *Edelman* (withdrawal from storage), *Southern Pacific Co.* (storage and use), and *Pacific Telephone* (retention and installation) support its validity.

B.

**The Imposition Of The Illinois Use Tax Upon United's Local Activities Of Storage And Withdrawal, Or Storage, Withdrawal From Storage And Installation, Does Not Discriminate Against Interstate Commerce Either By (1) Imposing The Tax Solely Upon Interstate Enterprises, Or (2) Levying The Tax Upon Interstate Commerce At A Higher Rate, Or (3) Subjecting Interstate Commerce To The Danger Of "Multiple Tax Burdens".**

In *Henneford* v. *Silas Mason Company*, 300 U.S. 557 (1936), a contractor engaged in the construction of the Grand Coulee Dam purchased supplies at retail in other states and brought them into the state of Washington to be used there in its construction project at the dam. After the property had come to rest, Washington imposed a tax upon the use[32] of these chattels in that state. The

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latter taxes because of the specific measure chosen is irrelevant here, since the Illinois measure accurately reflects the local incident taxed.

32. Apparently, the fact that the effect of a "compensating use tax" is to aid instate retail sellers "to compete upon terms of equality with retail dealers in other states who are exempt from a sales tax or any corresponding burden," and, that the tax helps to "avoid the likelihood of a drain upon the revenue of the state" does not vitiate an otherwise valid tax. Henneford v. Silas Mason Co., *supra*, at 581.

Silas Mason Company challenged the imposition of the tax as a violation of the Commerce Clause. Speaking through Justice Cardozo, this Court upheld the tax. The Court concluded that the incidence of the tax was not upon the operation of interstate commerce but upon the privilege of use after commerce was at its end. By way of analysis Justice Cardozo explained that tangible property transported in interstate commerce may be subject to a nondiscriminatory property tax when it has become part of the common mass of property within the state of designation. In addition the Court noted that the privilege of use was only one attribute, among many, of the bundle of privileges that constitute property or ownership — and, a state is at liberty, if it desires, "to tax them all collectively, or to separate the faggots and lay the charge distributively." *Id.* at 582. Labeling the Washington use tax an excise when its effect was solely upon the use of property did not, thought the Court, make the power to impose it less.

Although the Washington compensating use tax was similar in effect to the general use and storage and withdrawal taxes, the Court paid particular attention to the possible discriminatory aspects of the compensating use tax. However, upon clear scrutiny, the Court concluded that Washington use tax did not discriminate against interstate commerce.

The Court considered the following facts pertinent. The Washington sales and use taxes were imposed at the same rate. The use tax was imposed at the same rate upon in-state or extra-state purchases being used in the state. Neither in-state nor extra-state purchasers using property within the state need pay the use tax if the "use of any article of tangible personal property, the sale or use of which has already been subjected to a tax equal to or

in excess of that imposed by this title, whether under the laws of this state or of some other state . . ." In other words, no one who was using property in Washington after buying it at retail was to escape tax upon the privilege of enjoyment except to the extent that he had paid a use or sales tax somewhere, but everyone who had paid a sales or use tax anywhere on the same goods, to that extent, was exempt from the payment of the use tax in the state of Washington. In consequence, Justice Cardozo summarized:

> "Equality is the theme that runs through all sections of the statute . . . when the account is made up, the stranger from afar is subject to no greater burden as a consequence of ownership than the dweller within the gates." *Id.* at 583-84.

The imposition of the present Illinois use tax upon the storage and withdrawal of fuel by United does not discriminate against interstate commerce since it neither (1) imposes the tax solely upon interstate commerce, nor (2) imposes a higher rate of tax upon interstate commerce, nor (3) subjects interstate commerce to a "multiple tax burden."

In construing the Use Tax Act subject to a state challenge to its constitutionality, the Supreme Court of Illinois explained:

> "The Use Tax Act was enacted in 1955. It imposes a tax 'upon the privilege of using in this State tangible personal property purchased at retail * * * from a retailer.' (Section 3.) It applies whether the property is purchased in Illinois or elsewhere. The term 'use' is defined basically to mean the exercise 'of any right or power over tangible personal property incident to the ownership of that property.' (Section 2.) The use tax is imposed at the same rate as the tax under the Retailers' Occupation Tax Act, (Section 3;

cf. Ill. Rev. Stat. 1955, chap. 120, par. 441.) It does not apply to out-of-State transactions that would not measure a tax under the Retailers' Occupation Tax Act if they occurred in Illinois, nor is it applicable to the use of property purchased outside of Illinois on which a sale or use tax has been paid to another State, to the extent of the tax so paid. (Section 3.) The tax is to be collected by the retailer, but to the extent that a retailer remits the tax imposed by the Retailers' Occupation Tax Act, he is not required to remit the tax imposed by the Use Tax Act. (Section 9.) An out-of-State retailer may be licensed by the Department of Revenue to collect and remit the tax. (Section 6.) One who purchases from an out-of-State retailer who is not so licensed is required to pay the tax directly to the Department. (Section 10.) The act incorporates by reference many of the administrative provisions of the Retailers' Occupation Tax Act. (Section 12.)"

*Turner* v. *Wright*, 11 Ill. 2d 163-64, 142 N.E. 2d 84, *appeal dismissed*, 355 U.S. 65 (1957).

In summary, the Court concluded:

"The statute provides for a use tax that falls alike on those who purchase at retail within the State and those who purchase outside of it. That tax is to be collected by the Illinois retailer, but to the extent that he remits the tax due under the Retailers' Occupation Tax Act he is not required to remit the tax due under the Use Tax Act. The tacit assumption of the statute is that by this mechanism the tax advantage that was enjoyed by the buyer who purchased outside the State will be eliminated, without increasing the burden upon the buyer who purchases within the State. The accuracy of that assumption is not challenged. The Illinois retailer is required to remit one tax of [4%] per cent with respect to each sale within the State. That is the same tax that is levied with respect to each out-of-State purchase for use within the State. It is true that the scheme of this tax is more complex

than that of a use tax that falls only on out-of-State purchases. But its purpose and its results are those of the typical use tax, and the formal differences in the method by which those purposes are accomplished do not affect the validity of the statute.

It is not intended that both taxes shall reach the treasury with respect to a single transaction. It is intended and provided that one tax, and only one, shall reach the State treasury with respect to each purchase of property for use within the State, whether or not the purchase is made within Illinois. To that end the statute provides that the use tax collected by the retailer does not constitute a debt owed by him to the State when he 'is relieved of the duty of remitting such tax to the Department by virtue of his being required to pay the tax imposed by the Retailers' Occupation Tax Act upon his gross receipts from the same transaction.' (Section 8.)"[33] *Id.* at 167-68.

As can be seen by the above-quoted opinion, the Illinois use tax neither imposes the tax solely upon interstate commerce nor levies a higher rate upon that commerce. The issue that remains is whether the effect of the present tax imposes a multiple tax burden upon interstate commerce not borne by local uses.

The record clearly establishes that United by contractual obligation pays to Shell Oil Company an annual dollar amount that equals what Shell would pay to the State of Indiana if the purchase price of the sale of fuel to United was included in the gross receipts measuring the Indiana gross income tax. (A. 41, 101-02, 183; R. 153-56, 407). However, nowhere in the record is there any indication

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33. The Retailer's Occupation Tax Act and the Use Tax Act have, in relevant part, not substantially changed since the Turner opinion—*See,* Ill. Rev. Stat., 1963-1971, Ch. 120, §§439.1 et seq. and 440 et seq.

that Shell *in fact* pays any Indiana gross income tax that reflects a percentage of the receipts from the sale of fuel by Shell to United that is ultimately stored and withdrawn in Illinois. The fact that Shell contractually requires United to pay the analogous figure is irrelevant to the multiple state taxation issue here.[34] Notwithstanding the above, if in fact, Shell does pay to Indiana an Indiana gross income tax that reflects the fuel subject to this litigation measured by its sale price, apparently Shell does so in spite of an Indiana Tax Regulation that would exempt it. The regulation states:

> "Income is not taxable if it is derived from sales of goods which are picked up in Indiana by a common carrier, which was ordered to do so by the out-of-state purchaser, and delivered to an out-of-state destination."
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> Rule 1, Instruction 11-8, Ch. 11, Part A, INDIANA GROSS INCOME TAX REGULATIONS OF 1956. *See also, Gross Income Tax Division* v. *L. S. Ayres,* 233 Ind. 194, 118 N.E. 2d 480, 483 (1954).

However, even if it were true that Indiana requires Shell to pay an Indiana gross income tax that reflects a percentage of the receipts from the sale of fuel by Shell to United that is also subject to the present litigation, and Shell shifts the burden to United by contract, there still

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34. This Court has made it clear that one "claiming immunity from a tax has the burden of establishing his exemption." General Motors Corp. v. Washington, 377 U.S. 436, 441 (1964). In addition, it has been stated that ". . . the appellant is under the necessity of showing that in actual practice the tax of which it complains falls with disproportionate economic weight on it." Interstate Busses Corp. v. Blodgett, 276 U.S. 245, 251 (1927).

is no danger of multiple taxation." Ill. Rev. Stat. 1963-1971, § 439.3 (unnumbered para. 6, subsection (c)) states that the Illinois use tax shall not apply to the use of tangible personal property in this State if

> "(c) the use, in this State, of tangible personal property which is acquired outside this State and caused to be brought into this State by a person who has already paid a tax in another state in respect to the sale, purchase or use of such property, to the extent of the amount of such tax so paid in such other state; . . ."

United has not indicated that either it merits the above exemption, or, that if it in fact qualified for it, it has requested a set-off from the Illinois Department of Revenue for the tax paid to Indiana and has been denied the same. Within the immediate context, until United has shown that it qualified for the exemption and has been denied the same, argument concerning multiple taxation is pre-

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35. The "multiple burdens" doctrine articulated by Justice Stone in Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938) was founded upon the dual principles that (1) interstate commerce should bear its fair share of state tax burdens; however, (2) state taxes affecting interstate commerce should be sustained when not involving the *risk* of "cumulative burdens not imposed on local commerce", *Id.* at 255-56. *Accord,* Freeman v. Hewitt, 329 U.S. 249, 279 (1946) (concurring opinion, Rutledge, J.). However, in Northwestern States Portland Cement Co. v. State of Minnesota, 358 U.S. 450, 463 (1959) this Court appeared to be satisfied if there was no actual tax duplication. *Accord,* General Motors Corp. v. Washington, 377 U.S. 436, 449 (1964). Whether the "multiple burdens" test requires risk or actual tax duplication, the imposition of the present Illinois use tax upon United is valid—construing the term "risk" to mean that which might reasonably be anticipated to occur.

mature. Obviously, application of the above set-off provision would prevent the extra-state purchaser, who has paid a previous use or sales tax, from carrying an economic weight disproportionate to the local user. From the above, it is clear that United has not shown with any degree of clarity that the imposition of the Illinois use tax upon the storage and withdrawal from storage of the fuel in question subjects it to tax duplication not borne by local taxpayers.[36]

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36. When this Court originally evolved the "multiple burdens" doctrine, that doctrine appeared to be fashioned to reach state taxes that took within their ambit receipts of the taxpayer flowing from extra-state activities. *Compare,* Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938), *with* Adams Mfg. Co. v. Storen, 304 U.S. 307 (1948), Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434 (1939); Dept. of Treasury v. Wood Preserving Corp., 313 U.S. 62 (1941), and McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 57 (1940). However, in Joseph v. Carter & Weeks Stevedoring Co., 330 U.S. 422 (1947) and Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954) the Court struck down state taxes because of its concern with the possibility that if it upheld the tax several states could tax a complementary activity related to the flow of goods in interstate commerce (*i.e.*, loading and unloading of cargo and the taking and withdrawing of gas in pipelines). The latter concept with its emphasis upon the flow of articles in interstate commerce, if given too broad a scope, would greatly interfere with the ability of states to require interstate commerce to bear its fair share of local tax burdens. However, the Joseph application of the "multiple burdens" test acquires validity if a single taxpayer, dealing with the same article, is subject to taxation by several states on complementary interstate transactions. However, as evident above, United has not shown that it is being taxed upon the singular transaction of transferring property by both a sales and use tax.

## II.

## SINCE THE FACTS REVEAL THAT THE PURCHASE OF THE AVIATION FUEL IN QUESTION BY UNITED AIRLINES FROM SHELL OIL COMPANY IS BASICALLY AN ILLINOIS SALE TO AN ILLINOIS BUYER THAT WOULD SUPPORT A SALES TAX UPON THE PURCHASER, THE IMPOSITION OF THE PRESENT NON-DISCRIMINATORY USE TAX UPON UNITED (PURCHASER) IS VALID.

> "Although mere entry into a State does not take from a corporation the right to continue to do an interstate business with tax immunity, it does not follow that the corporation can channel its operations through such a maze of local connections as does [United], and take advantage of its gain on domesticity, and still maintain that same degree of immunity."
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> *General Motors Corp.* v. *Washington*, 377 U.S. 436, 448 (1964).

United Airlines not only maintains its principal place of business in Illinois, but Chicago is the hub of its interstate air operations. (A. 2, 56-57; R. 039, 33). Pursuant to a general requirements contract, from Chicago United sends its orders for the aviation fuel subject to this litigation to Shell in East Chicago, Indiana. (A. 129-30; R. 213-14). Ultimately, all the aviation fuel that United receives from Shell and stores at either O'Hare or Midway Airports is first transported by Shell from Shell's refinery in Wood River, Illinois, to Shell's storage facilities in East Chicago, Indiana. (A. 147-49, 153-57; R. 268-69, 274-75, 289-90, 292, 297-98, 300-01). During the interim, the fuel stops in East Chicago, Indiana for approximately 10 days. (A. 137-38; R. 231). Of all the fuel in East Chicago, Indiana, from Wood River, Illinois, about 12% is shipped to states

other than Illinois, but the balance goes to United and American Airlines at either O'Hare or Midway airport. (A. 154; R. 290). The turbine fuel destined for O'Hare is shipped via a common carrier pipeline of which Shell owns 20%. Then the fuel is stored at Des Plaines, Illinois, in storage facilities owned by Shell and leased by United and American — facilities which, by contract, shall contain only Shell products unless otherwise agreed by Shell. (A. 130-36, 140, 147; R. 216-17, 218-25, 243, 265). The turbine fuel is then shipped to O'Hare through pipelines owned by Shell. (A. 142-43; R. 246-48). By contract[37] between Shell and United, United takes delivery and title of the aviation fuel in East Chicago, Indiana, (A. 38; R. 104). However, Shell admitted that it was physically possible to deliver the turbine fuel directly to O'Hare Airport. (A. 146; R. 258-60). United sends its payment for the fuel from its office in Des Plaines, Illinois, to Shell at Indianapolis, Indiana. (A. 182; R. 369). It was not established where the general requirements contract was made.

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37. Generally, the law of sales has not been looked upon by this Court as determinative of the validity of taxes when applied to sales. *Compare* East Ohio Gas Co. v. Tax Comm'n., 283 U.S. 465 (1931); Rearick v. Pennsylvania, 203 U.S. 507, 512 (1906); *cf.* Superior Oil Co. v. Mississippi *ex rel.* Knox, 280 U.S. 390 (1930) *with* McLeod v. J. E. Dilworth Co., 322 U.S. 327 (1944). This Court has on several occasions emphasized that it is concerned with the substance of the taxable event not with the labels characterizing it. International Harvester Co. v. Wisconsin Dept. of Taxation, 322 U.S. 435 (1944); Wisconsin v. J. C. Penny Co., 311 U.S. 435 (1940); Railway Express Agency Inc. v. Virginia, 347 U.S. 359 (1954).

From the above, the impact of the delineated facts[38] indicates that both Shell and United have established significant contacts with the State of Illinois to support the imposition by the state of a sales tax upon United. Surely, if the state can impose a sales tax on United for its purchases of fuel from Shell, the state should be able to impose a non-discriminatory use tax."

In *McGoldrich* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940), New York City applied a sales tax to the sales of coal by a foreign corporation doing business in New York to local customers pursuant to contracts made in New York but calling for shipment and delivery direct from mines in Pennsylvania. The tax was fixed at "2% of the receipts from every sale in the city . . ." and sale being defined as "any transfer of title or possession, or both . . . in any manner or by any means whatsoever for a consideration or any agreement therefor." *Id.* at 42. The statute required that the tax be paid by the purchaser, and upon analysis, the Court concluded that the ultimate

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38. In the instant case, the examination of the whole record is helpful in grasping the total perspective of the contacts. *See,* General Motors Corp. v. Washington, 377 U.S. 436, 441-42 (1964). Also, in Memphis Natural Gas Co. v. Stone, 335 U.S. 80 (1947) the Court went beyond a stipulation of facts at the trial court to uphold the state taxation.

39. *Compare,* McGoldrich v. Felt & Tarrant Mfg. Co., 309 U.S. 70 (1940), *with* McLeod v. J. E. Dilworth Co., 322 U.S. 327 (1944). McLeod would seem to provide parties with the opportunity by contractual manipulation to convert what would otherwise be an exclusively local activity into an interstate transaction so that they could enjoy whatever tax immunity the appearance of doing interstate commerce can confer.

burden of the tax, both in form and substance, was laid upon the buyer for the consumption of tangible personal property measured by the sales price. *Id.* at 43. Justice Stone, speaking for the majority, sustained the state tax supported by the following rationale:

> "Here the tax is conditioned upon a local activity, delivery of goods within the state upon their purchase for consumption. It is an activity which, apart from its effect on the commerce, is subject to the state taxing power."
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> "It does not aim at or discriminate against interstate commerce. It is laid upon every purchaser, within the state, of goods for consumption, regardless of whether they have been transported in interstate commerce. Its only relation to the commerce arises from the fact that immediately preceding transfer of possession to the purchaser within the state, which is the taxable event regardless of time and place of passing title, the merchandise has been transported in interstate commerce and brought to its journey's end. Such a tax has no different effect upon interstate commerce than a tax on the 'use' of property which has just been moved in interstate commerce . . . [cases cited] . . ., or a property tax on goods by the state of destination at the conclusion of their interstate journey." *Id.* at 58, 59.

During the same term of the Court as *Berwind-White,* and on the authority of *Berwind-White,* the imposition of the New York City sales tax was upheld in three companion cases: *McGoldrich* v. *Compagnie Generale Transatlantique,* 309 U.S. 430 (1940); *Jagels, "A Fuel Corporation"* v. *Taylor,* 280 N.Y. 766, 21 N.E. 2d 526 (1939), *aff'd. per curiam,* 309 U.S. 619 (1940); and *McGoldrich* v. *Felt & Tarrant Mfg. Co.,* 309 U.S. 70 (1940). In *Compagnie* and *Jagels,* the corporate and other relevant facts were essen-

tially like those in *Berwind-White*, except in *Jagels*, the sales contracts were concluded outside the taxing city. In *Felt & Tarrant*, the taxpayer had no place of business in New York City and accepted the orders outside the city. The goods were then shipped into the taxing city, f.o.b. the place of shipment. Upon the basis that the "transfer of possession" took place in the taxing jurisdiction, the Court sustained the tax. *See also, Department of Treasury* v. *Wood Preserving Corp.*, 313 U.S. 62 (1941).

In *International Harvester Co.* v. *Department of Treasury*, 322 U.S. 340 (1944), the Court had before it three different types of sales transactions to which Indiana had applied its gross income tax measured by gross receipts. In class "C", Indiana buyers purchased from branches of the seller-taxpayer outside Indiana. The contracts of sale were entered into outside Indiana but the delivery occurred within Indiana. In class "D", buyers outside Indiana purchased from branches within Indiana, and the contracts were entered into in Indiana. Delivery occurred at the factory of the seller-taxpayer in Indiana. In class "E", Indiana buyers made purchases from Indiana branches where the contracts were made, but the articles were shipped by the taxpayer from its factories outside the state to the buyers in Indiana. The Court held that the Indiana gross income tax measured by the gross receipts could be applied to all three classes of sales without violating either the Commerce Clause as set forth in Article I, Section 8, clause 3 of the United States Constitution or the due process clause of the Fourteenth Amendment. In all three types of sales, this Court found local transactions which served as lawful taxable events apart from interstate commerce. Because substantial activity occurred in Indiana and the tax did not purport to reach proceeds from extra-state activities which had no connection with

the taxing state, the entire proceeds of the transaction were attributable to the taxing state. *Id.* at 343, 346. The reasoning of the Court in sustaining the class "C" sales is particularly applicable:

> "We see no difference between the sales in the Wood Preserving Corp. case and the Class C sales in the present one which is translatable into a difference in Indiana's power to tax. The fact that the sales in Class C are made by an out-of-state seller and that the contracts were made outside the State is not controlling. Here, as in the Wood Preserving Corp. case, delivery of the goods in Indiana is an adequate taxable event. When Indiana lays hold of that transaction and levies a tax on the receipts which accrue from it, Indiana is asserting authority over the fruits of a transaction consummated within its borders. These sales, moreover, are sales of Indiana goods to Indiana purchasers. While the contracts were made outside the State, the goods were neither just completing nor just starting an interstate journey. It could hardly be maintained that Indiana could not impose a sales tax or a use tax on these transactions. But, as we shall see, if that is the case, there is no constitutional objection to the imposition of a gross receipts tax by the State of thebuyer." *Id.* at 344-45.

In the present case, there is a sale of fuel refined and stored in Illinois for sale to an Illinois purchaser. The fact that the physical transportation of the fuel temporarily involves Indiana should not distort an otherwise local sale. *See, Department of Treasury of Indiana* v. *Ingram-Richardson Mfg. Co.*, 313 U.S. 252 (1941),[40] and *Eastern Air Transport*

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40. In Ingram-Richardson Mfg. Co., the Court sustained an Indiana gross income tax as applied to receipts of the company enameling stone parts brought into Indiana for that purpose and immediately shipped out again following the enameling operation. The Court found a

v. *South Carolina Tax Commission*, 285 U.S. 147 (1932). Surely, if Illinois can impose a sales tax upon United under the present facts, the state should be able to levy a use tax; especially when the risk of tax duplication, defined in its broadest sense, is not possible because of the present status of both Illinois and Indiana law."[41] *See*, Argument I-B.

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taxable local event wholly attributable to the taxing state even though interstate commerce was necessary for the performance of the enameling operation.

41. Even if one assumes that Indiana taxed Shell for the sale of the present fuel and Illinois had no use tax exemption for the payment of the out-of-state sales tax, presumably there still would be no multiple tax burden. International Harvester Co. v. Evatt, 329 U.S. 416 (1947), involved a state tax for the privilege of doing business of a multi-state enterprise measured by gross receipts from interstate sales of the manufactured goods. The complaining taxpayer argued that its tax, although apportioned, would be subject to the danger of tax multiplication by other states. The Court answered that, since "[the tax] is assessed only against the privilege of doing local Ohio business of manufacturing and selling, we do not come to the question, argued by appellant, of possible multiplication of this tax by reason of its imposition by other states. None of them can tax the privilege of operating factories and sales agencies in Ohio." *Id.* at 423. No other state can lawfully tax the privilege of storage and withdrawal of fuel in Illinois.

However, in its anlysis of state sales and use taxes, the REPORT OF THE SPECIAL SUBCOMMITTEE ON STATE TAXATION noted:

> "Although not unanimous, there is widespread agreement that the multiple imposition of both sales and use taxes on the same transaction is unjustifiable. And indeed almost all States have one provision or

another to avoid overtaxation of this kind; however, not all of these provisions are adequate. Two possible devises for eliminating the multiple imposition of sales and use taxes are: (1) requiring that the tax be imposed only at the place of first use and (2) a credit for taxes previously paid.

A rule that the tax be imposed at the place of first use or not at all raises a number of difficulties. First, there is the problem of developing a standard, applicable with reasonable certainty, as to what constitutes first use. Second, in those cases where multiple taxation may most easily arise—cases of mobile personal property—there is the specter that limiting the tax to the place of first use would make it possible for a buyer deliberately to put each piece of equipment into use in a free State or a low-rate State. To attempt to deal with avoidance of this kind by proration would serve to complicate a tax which has a rare element of simplicity in its one-time application.

The credit also presents difficulties. First, it gives primacy to the State of origin, even though the tax is a market-oriented levy. Thus, while the State of origin receives its tax in full, a State subsequently imposing the tax must reduce its tax by the amount paid the origin State. Second, with the credit device the user of mobile property may have to pay additional increments of tax to each succeeding State until the peak rate has been met. From a compliance point of view this means that each piece of equipment must be tagged with the aggregate tax paid to date. The credit rule might, therefore, incline users of mobile property to send into high-rate States only equipment already fully taxed.

Despite the technically rough operation of a credit, it appears to offer decided practical advantages over the more refined first-use concept. It is

## CONCLUSION

The appellees ask that the judgment of the Supreme Court of Illinois in this cause be affirmed.

Respectfully submitted,

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easy to understand, clear in its application, and does not lend itself to tax avoidance. Perhaps most important, it provides direct relief to the owner from whom tax is demanded as to property which had already been subjected to tax."

SPECIAL SUBCOMMITTEE ON STATE TAXATION OF INTERSTATE COMMERCE OF THE HOUSE COMMITTEE ON THE JUDICIARY REPORT ON STATE TAXATION OF INTERSTATE COMMERCE, H. R. No. 565, 89th Cong., 1st Session, Vol. 3, Ch. 28, pp. 893-94 (1965).

Supreme Court, U. S.
FILED
SEP 7 1972
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971.

**No. 71-862**

UNITED AIR LINES, INC.,

*Appellant,*

*vs.*

GEORGE E. MAHIN, ET AL.,

*Appellees.*

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS.

## BRIEF AS AMICI CURIAE OF AMERICAN AIRLINES, INC., BRANIFF AIRWAYS, INCORPORATED, DELTA AIR LINES INC., AND NORTHWEST AIRLINES, INC.

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This brief is presented with the consent of the parties, as shown by copies of letters from the partiies' attorneys which have been filed with the Clerk.

### Interest of Amici Curiae.

This case involves the levy of Illinois use tax on the loading of fuel on airplanes that are about to take off on interstate and foreign flights. The airlines filing this statement as *amici curiae* support and adopt the position and argument in appellant's brief that the Commerce Clause forbids such a tax. The *amici curiae* have a direct interest

in the outcome of the case because of the large tax liabilities involved. For example, American's claims for use taxes so levied and paid on the use of airplane fuel for a six-year period total more than $2,400,000, Braniff's more than $88,000, and Northwest's more than $700,000.

**Statutory Provisions.**

The following provisions of the Illinois Use Tax Act (Ill. Rev. Stat. 1971, ch. 120, §§ 439.1*ff*.) are relevant in this case:

> § 2. "Use" means the exercise by any person of any right or power over tangible personal property incident to the ownership of that property, . . .
>
> § 3. A tax is imposed upon the privilege of using in this State tangible personal property purchased at retail from a retailer, . . .
>
> • • • • •
>
> To prevent actual or likely multistate taxation, the tax herein imposed does not apply to the use of tangible personal property in this State under the following circumstances:
>
> (a) The use, in this State, of tangible personal property acquired outside this State by a non-resident individual and brought into this State by such individual for his or her own use while temporarily within this State or while passing through this State;
>
> (b) the use, in this State, of tangible personal property by an interstate carrier for hire as rolling stock moving in interstate commerce or by lessors under a lease of one year or longer executed or in effect at the time of purchase of tangible personal property to interstate carriers for-hire for use as rolling stock moving in interstate commerce as long as so used by such interstate carriers for-hire;
>
> (c) the use, in this State, of tangible personal property which is acquired outside this State and

caused to be brought into this State by a person who has already paid a tax in another State in respect to the sale, purchase or use of such property, to the extent of the amount of such tax so paid in such other State;

(d) the temporary storage, in this State, of tangible personal property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, is used solely outside this State or physically attached to or incorporated into other tangible personal property that is used solely outside this State.

The appealed decision holds that the exemption from the tax by clause (d) of section 3 does not apply to airplane fuel acquired outside the state, brought and stored here temporarily, and consumed in interstate and foreign flights. The decision holds that the loading of the fuel in the airplane is a taxable event under the provisions of sections 2 and 3 quoted above.

## ARGUMENT.

This case raises important questions concerning the scope of the protection afforded by the Commerce Clause against the direct encroachment by the states upon the stream of interstate commerce. More particularly, it involves the preservation of the Commerce Clause as a check upon "the disposition of cities and states to exploit their location astride the Nation's portals".* Unlike the Court's recent decision in *Evansville-Vanderburgh A. A. Dist.* v. *Delta Airlines, Inc.*, 92 S. Ct. 1349 (1972), this case involves, not the right of a state to exact reasonable charges for the use of state-provided facilities, but its power to augment its general revenues through excise taxes laid directly and disproportionately upon interstate commerce. However, the very fact that the Court has conceded to the states the power to impose charges like those in the *Evansville* case heightens the importance of this case: it emphasizes the need for protecting the Nation's interest in the free movement of goods and persons against unwarranted exactions that add to an accumulating burden of impediments to interstate air commerce.

In the decision appealed from, the State of Illinois, by virtue of its position as the situs of a terminal having the heaviest interstate and international air traffic of any airport in the world, has sought to allocate to itself, through a tax "upon the privilege of using" personal property, the entire value of the aviation fuel moving through that terminal onto planes using the terminal. Its claim rests on the theory that the loading of fuel into the tanks of the airplanes before take-off is a local taxable event, rather

* Jackson, *J.*, concurring in *Canton R. Co.* v. *Rogan*, 340 U. S. 511 517 (1951).

than an integral part of interstate and foreign commerce. That theory is plainly untenable in the face of this Court's decisions in *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157 (1954), and *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U. S. 422 (1947), and is contrary to principles long followed by the Court in preserving the very process of interstate commerce from direct taxation by the states.

The tenuous nature of Illinois' claim is apparent from the facts concerning the movement of the fuel Illinois is attempting to tax. The fuel is not produced, sold, or consumed in Illinois. It is continuously committed to and moving in interstate commerce from before it enters Illinois until it leaves Illinois. United Air Lines, the appellant, purchases the fuel from a seller in Indiana. Title passes in Indiana, and United takes delivery in Indiana.* The fuel moves from the seller's terminal in Indiana through common-carrier pipeline (or by common-carrier trucks) directly to the airlines' storage and handling facilities at O'Hare and Midway airports. After a brief delay, during which the fuel is tested for quality and filtered to remove impurities arising from the transportation process, it is pumped into the tanks of the airplanes. Fuel moves from Indiana on a daily basis. Its flow is interrupted in United's facilities at the airports only to the extent required by the practical exigencies of operation and the necessity for having a supply on hand to meet the schedule of traffic. The average period of delay is from two and a half to six days, varying with the type of fuel and the storage facilities involved. (Stip. par. 7, App. 38.) The planes which receive the fuel are either commencing interstate and foreign flights or are taking off in

*The Indiana Gross Income Tax is paid on the transaction in Indiana (Stip., par. 13, app. 41). Cf. *International Harvester Co.* v. *Dept. Treasury*, 322 U. S. 340 (1944).

continuation of interstate and foreign flights after a temporary stop for unloading, loading, and fueling. The fuel loaded aboard them is consumed entirely in interstate flight and, except for negligible quantities, outside the borders of Illinois.

Such a continuous movement of a commodity as part of an integrated interstate process affords no basis for a state tax upon the value of the commodity. The temporary presence of the aviation fuel under the circumstances of this case could not constitutionally be made the basis for a property tax on its value, and a similar tax denominated a "use" tax and asserted to be for "storage" could fare no better under the Commerce Clause.* The applicable test is that stated by Chief Justice Hughes in *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472 (1932), upholding a gasoline tax on the value of gasoline stored by a bleachery for use in its manufacturing processes within the state. "[W]e are not concerned with what the tax is called but with what the statute does. It imposes an exaction with respect to gasoline purchased in other States and brought into South Carolina and there placed by appellants in storage for future use within the State. By the terms of the Act, as construed by the state court and applied to these appellants, interstate commerce in relation to the subject of the tax has ended. The gasoline has come to rest within the State, having been placed in appellants' storage tanks and added to appellants' property kept for local purposes. In such circumstances the State has the authority 'to tax the products or their storage or sale.'"

In this case the fuel has never "come to rest" within Illinois within the meaning of the decisions of this Court,

* The use tax is obviously more objectionable than a property tax from the standpoint of the purposes of the Commerce Clause. In the case of moving goods, a property tax would fall only on the value of the quantity present in the state on tax day; the use tax falls on the entire value of the flow throughout the year.

it has never been "kept for local purposes" or stored "for future use within the State," and interstate commerce has not ended. *Coe* v. *Errol*, 116 U. S. 517 (1886); *Champlain Co.* v. *Town of Brattleboro*, 260 U. S. 366 (1922); *Hughes Bros. Co.* v. *Minnesota*, 272 U. S. 469 (1926); *Carson Petroleum Co.* v. *Vial*, 279 U. S. 95 (1929); cf. *Joy Oil Co. Ltd.* v. *State Tax Commission*, 337 U. S. 286 (1949); *Empresa Siderurgica S. A.* v. *Merced County*, 337 U. S. 154 (1949). The crucial question in determining whether the state may tax, as said in *Minnesota* v. *Blasius*, 290 U. S. 1, 9 (1933), is whether there is "continuity of transit." "If the interstate movement has begun, it may be regarded as continuing, so as to maintain the immunity of the property from state taxation, despite temporary interruptions due to the necessities of the journey or for the purpose of safety and convenience in the course of movement." 290 U. S. at 9-10. A breach in the continuity of transit has most often been found where the temporary halt or storage was of a kind giving rise to the possibility that the property might be diverted from its interstate destination to a local one, a circumstance plainly absent here. Cf. *Minnesota* v. *Blasius; Joy Oil Co. Ltd.* v. *State Tax Commission.* Mere delay in transit, or temporary storage, is not by itself sufficient to allow the state to tax, and interruptions for weeks or even months have been held not to deprive the property in transit of its immunity from state taxation. *Coe* v. *Errol; Champlain Co.* v. *Town of Brattleboro; Hughes Bros. Co.* v. *Minnesota.* The brief delay of the fuel in appellant's tanks in this case is a far cry from the fifteen months' storage while awaiting trans-shipment which was held, by a sharply divided Court in the *Joy Oil Co.* case, to bar immunity from local taxation. The delay here is similar to the temporary storage in *Carson Petroleum Co.* v. *Vial*, where there was an accumulation of oil in the dockside tanks of the exporter

while waiting for ships to arrive, a delay occasioned by the practical necessities of carrying out the continuous interstate transit.* If United took its aviation fuel in tank trucks at the Indiana refinery, drove the trucks directly to the side of its airplanes, and loaded the planes from those trucks, it would be beyond dispute that the fuel was in interstate commerce throughout its passage in Illinois. Under the cases cited above, the result can be no different merely because pipelines and tanks at the airport are used instead.

It is apparent, therefore, that Illinois could not impose its tax by reason of the presence or "storage" of the fuel in Illinois. But in fact Illinois has not purported to do so. In recognition of the constitutional principles reflected in the above-cited cases, the Illinois Use Tax Act does not attempt to reach the temporary storage of property in interstate commerce. It expressly excludes from the definition of a taxable use "the temporary storage of property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, is used solely outside this State." § 3, clause (d), above pp. 2-3. Although this exemption may cover even some situations where the property is not in interstate commerce, it is clearly broad enough to cover those where, as in this case, the property is in continuous interstate transit.

In the face of this statutory provision, the problem for the Illinois taxing authorities in attempting to reach

* The testing for quality and filtering of transportation impurities that occurs as the aviation fuel moves through United's tanks is likewise plainly a necessary incident of the interstate movement and not an independent "processing" that could be deemed to break the transit. Quite properly, Illinois has not relied on this aspect of the case to support its tax, any more than it could rely on changes in the size of pipeline or changes in the mode of transportation. Cf. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157, 163 (1954), where the gas was "compressed, cooled, scrubbed, and dehydrated" as part of the interstate movement.

United's aviation fuel was to find a "use" of the property occurring after "temporary storage" but not "outside this State." A "use" within the statute could be found in the consumption of the small amount of the fuel burned in the airplanes during the Illinois portion of their departing flights. The Department of Revenue initially sought to tax only that use. But that "use," as was later recognized, was one that Illinois is forbidden to tax under the many authorities prohibiting direct taxation of interstate commerce, including those discussed above, but most particularly under this Court's decision in *Helson and Randolph v. Kentucky*, 279 U. S. 245 (1929), specifically forbidding a tax on the use of gasoline within the state by a carrier engaged in interstate commerce.

The new position of Illinois, represented by the decision below, seeks to escape this dilemma by an artful interpretation of the statute. Extending its grasp to the entire amount of the fuel, Illinois has now purported to find in the very act of loading the fuel on board the airplanes an event that breaks the "continuity of transit" and constitutes a local use. As explained in the ruling of the Illinois Department of Revenue upheld by the Illinois Supreme Court, "The Department's position is that temporary storage ends and a taxable use occurs when the fuel is taken out of storage facilities and is placed into the tank of the airplane, railroad engine or truck. At this point, the fuel is *converted into its ultimate use*, and, therefore, a taxable use occurs in Illinois." (App. 23. Italics supplied.) Employing a slightly different verbal formula, the Illinois Supreme Court has said that the *intention* of United to use the fuel "only to facilitate [its] operations from the O'Hare and Midway airports" (and, thus, to use the fuel within the State) deprives the fuel of the "temporary storage" exemption of the Illinois statute (App. 202).

On either formulation, it is obvious that the operative event that Illinois deems sufficient to allow it to tax is the loading of the fuel on board airplanes for consumption in interstate commerce. The Illinois Supreme Court's emphasis on "intention" as the decisive circumstance (presumably because the intention comes before the loading) cannot disguise the fact that it is the loading and use of the fuel that alone triggers the tax. Indeed, the Illinois court's reliance on "intention" stands constitutional doctrine on its head. While it is settled that mere intention to commit property to interstate commerce cannot *confer* immunity from state taxation (cf. *Empresa Siderurgica* v. *Merced County*, 337 U. S. 154 (1949)), it is a bizarre holding that such an intention *deprives* the property of its immunity and can be the very basis for a state tax.

Under the decision below, the case must be considered precisely as if the Illinois statute read, "A tax is hereby imposed upon the loading of fuel on airplanes bound on interstate and foreign flights". The Illinois Supreme Court concedes that the tax would not apply if fuel were loaded and transported out of the state by any means other than flights of interstate aircraft. "It is clear that if United was to withdraw its fuel from storage at Des Plaines and the airports and transport it outside the State for use elsewhere, as for example at an airport in nearby Wisconsin, the exemption would apply and neither the storage, nor the withdrawal, nor the transportation of the fuel outside the State would be uses subject to the tax" (App. 202). The Illinois court has thus adopted a special interpretation of the statute for the sole purpose of reaching fuel loaded for interstate flights. The vice of the tax is compounded. Not only is it a tax on "interstate commerce". It is a tax that is "aimed at or discriminates against" interstate commerce.

Unless the Court is to abandon both ancient and recent

authority, a tax on the loading of interstate carriers is a tax on interstate commerce itself and is forbidden. In *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U. S. 422 (1947), the Court held invalid, as a direct tax on interstate commerce, a gross receipts tax on the loading and unloading of interstate vessels. "The transportation in commerce," said the Court, "at the least, begins with loading and ends with unloading." (330 U. S. at 427.) That decision was a reaffirmation of *Puget Sound Stevedoring Co.* v. *Tax Commission* 302 U. S. 90 (1937), and a long line of earlier cases outlawing gross receipts and similar taxes levied "on the commerce itself." (330 U. S. at 433.) The decision was reached over a dissenting opinion which acknowledged the controlling force of the line of decisions relied on by the majority but proposed that the doctrine be changed.* The Court again adhered to its position and reaffirmed the principle of the *Carter & Weekes* case in *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157 (1954). The Court there held invalid a Texas tax on the "gathering" of natural gas as applied to the "taking" of the gas by an interstate pipeline from the pipes of the producer. As the opinion said, "It is now well settled that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of the interstate commerce, the flow of commerce, that it cannot realistically be separated from it." (347 U. S. at 166.) The Court declined to recognize the event of transferring the gas from the pipeline of the gasoline plant to the pipeline of the interstate carrier (the

*Mr. Justice Douglas' dissenting opinion proposed that a "fairly apportioned" tax be sustained, notwithstanding that it was a direct tax on the commerce. That suggestion would of course be of no help to the Illinois tax in the present case, since it is a tax levied on the entire value of the fuel being loaded. In this respect, indeed, the present case presents a much more drastic imposition than the tax condemned in *Carter & Weekes*, where the tax was only on the value of the loading activity itself, not on the goods being loaded. Compare *Canton R. Co.* v. *Rogan*, 340 U. S. 511 (1951), emphasizing the importance of this distinction under the Export-Import Clause.

"taking or loading for transmission," *id.* at 167) as a severable local event—and this notwithstanding that the transfer in the *Pipe Line* case, in contrast to the instant case, coincided with a change of possession and the transfer of title. The tax on loading involved in the present case is indistinguishable from the tax on gathering held invalid in the *Michigan-Wisconsin* case.

*Edelman* v. *Boeing Air Transport, Inc.*, 289 U. S. 249 (1933), obliquely relied on by the court below, does not support the Illinois tax. The *Edelman* case sustained a fuel tax as a tax upon "the storage and withdrawal" of the fuel, not as a tax on the loading, as this Court explicitly and correctly recognized in the *Carter & Weekes* decision, where *Edelman* and similar cases were distinguished. (330 U. S. at 431, 432 n. 18, citing the Court's earlier decision in *McGoldrick* v. *Berwind-White, Co.*, 309 U. S. 33 (1940).) And the facts as to storage differed markedly from those in the present case: the gasoline brought from out of state was commingled in the taxpayer's tanks with gas purchased intrastate and it was held not only for use in the taxpayer's planes but for sale to others. In addition, under the Court's recent decision in the *Evansville* case, 92 S. Ct. 1349 (1972), the exaction in *Edelman* was readily sustainable on the ground that it was limited to the maintenance and improvement of the municipal airports used by the air transport company.* Clearly the State of Wyoming could not have been suspected of attempting to exploit interstate commerce by reason of a strategic geographic position in air transportation.

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* In the Court of Appeal's opinion, *Boeing Air Transport* v. *Edelman*, 61 F. 2d 319, 323 (C. A. 10, 1932), it was explained that, after the City of Cheyenne gave the appellant air carrier the right to use the city's airfield for 25 years, the legislature amended the tax statute to provide that "the State Treasurer shall pay over all funds received from the gasoline license tax on gasoline used at any municipal air field to the city or town where such air field is located, to be used for the maintenance and improvement of such air field".

Aside from those differences, the *Edelman* case represented a high-water mark in the Court's search in the early thirties for formulas that would assist states in finding additional sources of revenue. It reflected an incipient permissiveness toward taxation of the process of interstate commerce that has been rectified by the subsequent course of decision. Mr. Justice Stone, reluctantly concurring in the *Helson* decision, had advanced the view that no "practical justification" could be found for relieving interstate commerce from a tax "which is neither aimed at nor discriminates against interstate commerce" (279 U. S. at 253). His opinion for the Court in the *Edelman* case a short time later plainly reflected that attitude. But as the Court noted in *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, "this view has not prevailed" (347 U. S. at 166). Mr. Justice Stone had himself helped lead the Court toward recognition that the "practical justification" for more stringent rules is the danger that a state, even under a nondiscriminatory tax, may attribute to itself values to which other states may lay equal claim under similar or different taxes. Thus the danger of "multiple burdens," actual or potential, became an additional touchstone. It was forcefuly urged in Chief Justice Stone's 18-page dissent, joined in by three Justices, in *Northwest Airlines* v. *Minnesota*, 322 U. S. 292 (1944), where a divided and troubled majority upheld a Minnesota property tax on the entire value of a fleet of airplanes based there: "The tax now sustained is so obviously disproportionate to the protection afforded to the taxed property by the taxing state as to place a constitutionally intolerable burden on interstate commerce. . . . It is no answer to suggest that the states other than Minnesota have not asserted their constitutional power to tax or that we do not know how or to what extent they may have exercised it. . . . It is enough to know that the tax exposes petitioner to 'the risk of a multiple burden to which local commerce is not exposed' [citing *Adams Mfg. Co.* v. *Storen*, 304 U. S.

307, 311 (1938), and *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434, 439 (1939)]." (322 U. S. at 326).

A constitutional theory permitting Illinois to tax the entire quantity of fuel "loaded" or "taken" in Illinois would be difficult to reconcile with denial of similar claims by other states based on similar "incidents" such as "bringing in" or "consumption." See *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U. S. at 429. The claim asserted by Kentucky in the *Helson* case shows that the danger is not fanciful, not to mention the claim of Indiana in the present case to a tax on the gross receipts from the sale.

The solution urged by Chief Justice Stone's dissent in the *Northwest Airlines* case was "apportionment". In that and other contexts the notion of apportionment has at times been put forward as an alternative or a supplement to the rule forbidding "direct" taxation of the process of interstate commerce and the instrumentalities of interstate commerce. See *Standard Oil Co.* v. *Peck*, 342 U. S. 382 (1952); *Central Greyhound Lines, Inc.* v. *Mealey*, 334 U. S. 653 (1948); *Canton R. Co.* v. *Rogan*, 340 U. S. 511 (1951); and cases discussed in the dissenting opinion of Douglas, J. in *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U. S. 422, 434 (1947). That view might conceivably lead the Court, in a case presenting the issue, to a reexamination of the *Helson* case and to acceptance of the "burn-off rule" initially followed by the Illinois Department of Revenue, taxing the portion of fuel actually used within the state. Such a departure might have far-reaching implications for the doctrine forbidding direct impositions "on interstate commerce itself." But those problems are irrelevant to the validity of the tax involved in the present case, which is a tax on the entire value of the fuel used in interstate operations and in no sense an apportioned tax.

The issue in this case is narrow but important. Sustaining the Illinois tax would destroy the clear boundary of protection long maintained by the Court around the very process of interstate commerce and its instrumentalities. Ever since *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. 326 (1887), the Court has been alert to guard the facilities of interstate commerce and the interstate movement of goods against excise taxes in the nature of gross receipts taxes bearing directly on the interstate process itself. This special solicitude has not been nullified or eroded by the emergence of the doctrine that "interstate commerce must pay its way," reflected in decisions permitting sales and use taxes in a variety of situations involving interstate transactions. E.g. *Henneford* v. *Silas Mason Co.*, 300 U. S. 577 (1937); *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938); *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940). The question was thoroughly recanvassed in 1947 in the *Carter & Weekes* case, and the long-standing recognition of a special zone of protection for the very process of interstate commerce was reaffirmed. Nor has the principle been called into question by the Court's very recent decision in the *Evansville Airport* case. That decision merely followed the distinction, recognized in many prior cases, between a toll or fee for the use of state-provided facilities and a general-revenue tax.

The principle involved is not a merely artificial, mechanical, or technical concept, although its enforcement necessarily involves maintaining a constitutional line of demarcation between segments of a physical and economic continuum. The doctrine is prophylactic in its purpose and effect. Its practical function is that the national interest in the free and efficient movement of goods and persons is protected against local exploitation of the channels essential to the national market and the national community. Such protection is required not only as against the more obvious forms of such exploitation, such as

frankly discriminatory taxation, but also against the temptation of states to structure or distort their tax systems so as to throw an undue proportion of their costs of government upon special sources of interstate-commerce revenue inherent in their geographic position. That the temptation is a real one is illustrated by the present case. Illinois has not in general attempted to tax property that is only temporarily within the state and that is to be used outside the state. It clearly could not tax the consumption of fuel by airplanes in interstate flights, even though such consumption took place within the state's borders. Yet in this case it has contrived to interpret its tax laws to enable it to tax the entire amount of aviation fuel supplied for interstate and foreign commerce at one of the largest airports in the world. Since it has been compelled to do so by focusing the tax upon an integral step in interstate commerce, it has transgressed the settled bounds of state taxation.

The judgment of the Illinois Supreme Court should be reversed.

August, 1972.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

## NO. 71-862

UNITED AIR LINES, INC.,

*Appellant,*

*vs.*

GEORGE E. MAHIN, et al.,

*Appellees.*

## ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

## SUPPLEMENTARY STATEMENT

On June 19, after appellant filed its main brief in the instant case, this Court dismissed for want of a substantial federal question, 92 S.Ct. 2461 (1972), the appeal from the Ohio Supreme Court in *United Air Lines* v. *Porterfield*, 28 Ohio St.2d 97, 276 N.E.2d 629 (1971). The Ohio Supreme Court had upheld, against Commerce Clause objections, the validity of a state excise tax on the privilege of engaging within Ohio in the air transportation of persons and property, imposed at a rate of 4% on the gross receipts from such transportation. The tax base included gross receipts from interstate flights to and from Ohio airports apportioned on the basis of mileage in and outside of Ohio. The Ohio court relied primarily on *General Motors Corp.* v. *Washington*, 377 U.S. 436 (1964), from which it concluded that this Court will uphold a "fairly apportioned gross re-

ceipts tax" so long as it is not directly on the privilege of engaging in interstate commerce.

In Part II of its main brief (pp. 44-50), United argued (as an alternative to its principal argument that no tax could be imposed on the act of loading fuel on interstate flights) that if Illinois may impose any use tax on the fuel loaded in Chicago by United, it constitutionally could do so only on that portion actually consumed in Illinois. The theory of this contention is that, although the use tax would be measured by the consumption of fuel on interstate flights, it would be reasonably apportioned to Illinois within the rationale of such cases as *Central Greyhound Lines* v. *Mealey*, 334 U.S. 653, 661-664 (1948), and *General Motors Corp.* v. *Washington, supra.* Inasmuch as the State's brief does not discuss that argument at all, United is submitting this Supplementary Statement separate from its Reply Brief.

*United Air Lines* v. *Porterfield* adds a precedent closely analogous to the instant case. Both the Ohio and Illinois taxes are privilege taxes. The Ohio tax is on the receipts from interstate transportation and the Illinois tax is on the purchase price of the fuel used in interstate transportation. The validity of the Ohio tax was sustained because it was applied to the gross receipts derived from interstate flights only in proportion to the Ohio mileage of such flights to their total mileage. United's alternate theory in this case would sustain the Illinois use tax only to the extent it was imposed on fuel consumed in or over Illinois.

## REPLY BRIEF FOR APPELLANT

### INTRODUCTION

Appellee's brief in large part is devoted to arguments not relevant to the Commerce Clause and due process issues before this Court—whether Illinois can impose a privilege-use tax on the act of loading fuel aboard interstate and foreign flights.*

The State argues first that the sale of the aviation fuel by Shell to United actually took place in Illinois and therefore should be subject to Illinois tax. It further argues that if the sale did not occur in Illinois, it was because of arrangements artificially contrived to avoid Illinois tax on the fuel, which should nonetheless be imposed. This approach does nothing to resolve the basic issue before this Court.

In support of these themes, the State asserts that 70-80% of the fuel is refined at Wood River, Illinois (near East St. Louis); that it is unnecessary for Shell to use its northern Indiana terminal in delivering the fuel to United; and that Shell could physically deliver the fuel to United at O'Hare (and presumably Midway) airports rather than in northern Indiana as the parties have contracted.

This version of the facts is not in accord with the Stipulation (Stip. ¶ 6, App. 38) into which the State entered before trial that:

"[a]ll such fuel (aviation gasoline for piston aircraft

* A variation of this issue is whether Illinois can deny a general statutory exemption from use tax for property temporarily stored in Illinois because it is stored there solely to facilitate United's interstate flight operations from the Chicago airports. See United's main Brief, pp. 30-32.

and kerosene for turboprop and jet aircraft) is purchased by United from Shell Oil Company, and is delivered to United, with possession, title and all risk of loss passing to United, either at Hammond, Indiana, or at East Chicago, Indiana."

It ignores the express finding of the trial court that (App. 185):

"The plaintiff [United] contends and the proof establishes* that all of this fuel is purchased from Shell Oil Company in the State of Indiana . . . ." (Footnote added.)

It ignores the Illinois Supreme Court's explicit adoption of the trial court's finding (App. 194):**

"[c]onforming to the practice which has been essentially the same since May, 1953, United purchases and takes delivery of the aviation fuel in question from Shell Oil Company at facilities of the latter located in Hammond and East Chicago, Indiana."

Attached to this Reply Brief, as Exhibit A, is a summary of the record on this factual issue.

The State's brief is selective of the facts bearing on its themes. It implies that the shipment from Wood River to northern Indiana traverses an artificially tax-motivated route, but this implication ignores the facts that Shell's private pipeline between those two points was built in 1928, and since 1938 has carried all of Shell's refinery products from Wood River to its northern Indiana terminal, of which aviation fuel is only about 30% of the products han-

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* See, *e.g.*, Tr. 213, 216-217, 255-260, 302-304, 307-308, 369, App. 129, 130-131, 144-146, 157-158, 160, 182.

** Although this finding was not cross-appealed by the State to the Supreme Court of Illinois, the State again raised the issue of where the fuel was purchased in its brief and oral arguments before that Court.

dled there. (Tr. 291, 310-311, App. 154-155, 162.) It also fails to acknowledge that there is no practical way that Shell can bypass its northern Indiana terminal for these large quantities destined for the Chicago airports.*

The State's brief seeks to attach significance to the fact that "Shell admitted that it was physically possible to deliver the turbine fuel directly to O'Hare Airport." (Brief, p. 43, citing Tr. 258-260, App. 146). This overlooks the fact that such delivery by Shell would have to be effected by using the same facilities of common carriers between Shell's Indiana terminal and the Chicago airports as does United. (Tr. 280-288, App. 150-153.)

Finally, the State's brief ignores the fact that United has taken delivery of aviation fuel at Shell's northern Indiana terminal for Chicago, and for other Midwestern airports, since May, 1953, two years prior to the enactment of the Illinois Use Tax Act. (Stip. ¶ 6 & n. 7, App. 38; Tr. 309, 350-351, App. 161, 174-175; Ill. Sup. Ct. Opinion, App. 194.)

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The State's brief also fails to address itself to several of the major arguments set out in United's principal brief—i.e., Parts IB, ID and II. In particular, it is surprisingly silent as to United's alternative contention that if any of

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* The record discloses that Shell could not bypass its northern Indiana terminal except by constructing a spur pipeline to the Chicago airports at a cost, estimated during the trial in 1968, of over $2,000,000. (Tr. 287-288, App. 152-153.)

The evidence also establishes that Shell could not pump directly from Wood River to O'Hare through existing pipelines without the fuel coming to rest in northern Indiana, because the diameter of Shell's products pipeline is larger than that of the common carrier lines that intersect it at Shell's northern Indiana terminal, and because it would be a practical impossibility to coordinate Shell's pumping schedules with those of the common carriers. (Tr. 280-288, App. 150-153.)

the fuel loaded in Illinois is constitutionally taxable, it is only that portion actually consumed within Illinois. (United's main Brief, Part II, pp. 44-50.)

Even of the issues the State's brief discusses, it pays scant attention to the authority cited by United. For example, except in a footnote, it does not attempt to distinguish any of the principal authority—*Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157 (1954); *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947); *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U.S. 90 (1937); and *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69 (1946)—cited by United in support of its contention that the act of loading the fuel onto interstate flights cannot be constitutionally taxed.

## ARGUMENT

### I. The State Has Attempted to Tax an Integral Aspect of Interstate Commerce, Namely the Loading of Fuel Aboard Aircraft About to Depart in Interstate Commerce, Forbidden by the Commerce Clause.

The State's brief posits two theories of the taxable incidence of the Illinois Use Tax Act as applied to United's fueling of its aircraft (Brief, p. 27):

> ". . . the taxable incident in this cause can reasonably be construed to be either storage and withdrawal [of the fuel]; or storage, withdrawal from storage and conversion to ultimate use, both measured by the amount of gas that has been stored in Illinois and withdrawn to be loaded upon United's aircraft at O'Hare and Midway."*

In support of the first theory that the tax is only on storage and withdrawal, the State quixotically argues that *any use* of the fuel in Illinois after the storage nullifies the statutory exemption, so that if the later use of the fuel is "installation [loading] or consumption," it is not such use that is the taxable event, but the earlier storage and withdrawal, which otherwise would have been exempt. (*Ibid.*)

All this ignores the opinion of the Illinois Supreme Court, which makes the *act of loading* the fuel aboard United's aircraft the incidence of the tax. (See United's main Brief, pp. 8, 20-21.) Contrary to the State's suggestion, the taxable incidence cannot be the storage and with-

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* Elsewhere, the State prefers the formula "storage and withdrawal" (e.g., Brief, p. 36), presumably because this formulation is more easily defensible than one which includes "conversion to ultimate use," which is the act of loading the fuel aboard United's aircraft.

drawal from storage, because, according to the reasoning of the Illinois Supreme Court, the critical factor is what occurs *after* the withdrawal. For example, if after withdrawal, the fuel is loaded into a truck or railroad tank car and is transported to another state for use at an airport in that state, no tax is due (App. 202); if the fuel is loaded into the tanks of a departing aircraft (or in a locomotive or a truck gas tank), the fuel so loaded is subject to Illinois use tax even though it is carried from the State in the aircraft tanks. (*Ibid.*) It follows that, under the Illinois Court's decision, the taxable event is, and can only be, the act of loading the fuel aboard United's aircraft in Illinois just prior to their interstate journeys. This act of loading also constitutes the measure of the tax.

The State further contends that "even if the taxable event is interpreted to include storage, withdrawal from storage, and installation of the fuel that ultimately propels the aircraft" (Brief, p. 27), the use tax may nevertheless be applied to United's fuel, citing *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U.S. 249 (1933), and *Edelman* v. *Boeing Air Transport*, 289 U.S. 249 (1933), both distinguished in United's main brief (p. 14-15). That discussion need not be repeated here, other than to reiterate that the taxes in those cases were imposed by the state statute upon the storage and/or withdrawal from storage of gasoline, both of which events occurred "before use of the gasoline in interstate commerce begins." *Nashville C. & St. L. Ry.* v. *Wallace*, 288 U.S. at 268. In the instant case, because of the temporary storage exemption in the Illinois statute, there is no tax unless the storage and withdrawal are followed by loading the fuel into the aircraft; the tax necessarily is imposed upon the act of loading fuel onto the interstate flights, which is "an integral part of the interstate process." *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 166 (1954).

Even further removed factually from the instant situation are *Southern Pacific Co.* v. *Gallagher,* 306 U.S. 167 (1939), and *Pacific Tel. & Tel. Co.* v. *Gallagher,* 306 U.S. 182 (1939). In the former case, the taxpayer purchased equipment and supplies in other states which were transported to California where they were used in Southern Pacific's operations or installed as part of its rolling stock or right-of-way. In some instances, the installation was immediately after the goods came to rest in California; otherwise, they were stored until needed. Unlike the Illinois Use Tax Act, the California statute contained no exemption for temporary storage. In sustaining the application of California's use tax to these items, this Court accepted the characterization of the tax as one on "intrastate storage and use" that occurred *before* installation or use in the railroad's interstate operations. 306 U.S. at 174. The State's brief correctly alludes (p. 32) to the following conclusion of this Court (306 U.S. at 177):

> ". . . there was a taxable moment when the . . . [goods] had reached the end of their interstate transportation and had not begun to be consumed in interstate operation. At that moment, the tax on storage and use—retention and exercise of a right of ownership, respectively—was effective. The interstate movement was complete. The interstate consumption had not begun."

This Court further observed that "[a] tax on property or upon a taxable event in the state, *apart from operation,* does not interfere [with interstate commerce.]" (Emphasis added.) 306 U.S. at 178. It then distinguished *Puget Sound Stevedoring Co.* v. *Tax Commission,* 302 U.S. 90 (1937), on the basis that it involved a tax on the gross receipts from loading and unloading interstate cargoes, which was an impermissible burden on interstate commerce.

Yet a tax upon interstate "operation" is precisely what

Illinois would accomplish by application of its use tax to the act of loading fuel on interstate flights.* Far from sustaining the State's position in the instant case, *Southern Pacific*, particularly its distinguishing of *Puget Sound*, rejects a tax upon the loading of fuel aboard an interstate carrier—that is, use of the fuel "in the sense of consumption or operation."** 306 U.S. at 174.

What the State fails to recognize is that in each of the cases it cites—*Edelman*, *Nashville*, *Southern Pacific* and *Pacific Telephone*—the state statute imposed the tax at a point of time prior to the use of the goods in interstate commerce. This fact distinguishes those cases from *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, *supra*, the stevedoring cases, and *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69 (1946) (Import-Export Clause), in which the incidence of the tax was on an inseparable element of the interstate movement—i.e., in each case, on the act of loading that commenced the interstate movement. This fundamental difference was explicitly recognized by this Court in *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 431, 432 n. 18 (1947), which, by quoting from *McGoldrick* v. *Berwind-White Co.*, 309 U.S. 33, 49 (1940),

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* It is noteworthy that in *Southern Pacific* the goods were used or consumed in California, while in the instant case, except for *de minimis* amounts, the fuel only passes through Illinois and is consumed elsewhere.

** *Pacific Tel. & Tel. Co.* v. *Gallagher*, *supra*, a companion case to *Southern Pacific*, involved the same questions and is therefore likewise distinguishable from the instant case. In *Pacific Telephone*, this Court noted that the Company "exercises two rights of ownership in California—retention and installation [of materials purchased outside the State]—after the termination of the interstate shipment and before the use or consumption on its mixed interstate and intrastate telephone system. We see no material distinction between the contentions of the [Company] and those disposed of in [the *Southern Pacific* case]." 306 U.S. at 187.

distinguished by name three of the four cases cited by the State on this very point.*

This failure to perceive that basic distinction between the two lines of cases underlies the State's argument that the fuel could be subjected to Illinois use tax because it has come to rest in Illinois before it is loaded onto United's aircraft. It is irrelevant whether or not the fuel came to rest, because the legal incidence of the tax, as construed by the Illinois Supreme Court, is not on the storage (which is not taxed under the Illinois statute apart from what follows the storage), but on the loading aboard the departing aircraft.

Apart from that argument's irrelevance, it is doubtful that the fuel has come to rest in Illinois so as to acquire a taxable situs there. On the contrary, the authorities cited by the State, all dealing with non-discriminatory property taxes, lead to the conclusion that the tax sought by Illinois would be on fuel actually moving in interstate commerce. This point is persuasively made in the brief (pp. 5-10) of the *Amici Curiae* in this case.

The standard has been enunciated by Mr. Chief Justice Hughes in *Minnesota* v. *Blasius*, 290 U.S. 1, 9-10 (1933):

> "... If the interstate movement has begun, it may be regarded as continuing, so as to maintain the immunity of the property from state taxation, despite temporary interruptions due to the necessities of the journey or

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* "... Such a tax has no different effect upon interstate commerce than a tax on the 'use' of property which has just been moved in interstate commerce, sustained in *Monamotor Oil Co.* v. *Johnson*, 292 U.S. 86; *Henneford* v. *Silas Mason Co., supra; Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U.S. 62; *Southern Pacific Co.* v. *Gallagher*, 306 U.S. 167, or the tax on storage or withdrawal for use by the consignee of gasoline similarly sustained in *Gregg Dyeing Co.* v. *Query*, 286 U.S. 472; *Nashville, C. & St. L. Ry. Co.* v. *Wallace*, 288 U.S. 249; *Edelman* v. *Boeing Air Transport*, 289 U.S. 249 ...." 309 U.S. at 49.

for the purpose of safety and convenience in the course of movement. . . . *Formalities, such as the forms of billing, and mere changes in the method of transportation do not affect the continuity of the transit.* The question is always one of substance, and in each case it is necessary to consider the particular occasion or purpose of the interruption during which the tax is sought to be levied. . . . *The mere power of the owner to divert the shipment already started does not take it out of interstate commerce if it appears 'that the journey has already begun in good faith and temporary interruption of the passage is reasonable and in furtherance of the intended transportation.'*" (Citations omitted and emphasis added.)

See *Carson Petroleum Co.* v. *Vial*, 279 U.S. 95, 101-104, 107-109 (1929), and cases cited therein, holding that oil refined in Kansas, Oklahoma and Texas, shipped to Louisiana and stored there where it was "always awaiting either the arrival of a ship or the accumulation of a sufficient quantity of oil to load a ship" (279 U.S. at 101) was in a continuous movement in interstate and foreign commerce and could not therefore be subjected to an *ad valorem* property tax by Louisiana; *Hughes Bros. Co.* v. *Minnesota*, 272 U.S. 469, 474-476 (1926); compare *Joy Oil Co.* v. *State Tax Commission*, 337 U.S. 286 (1949); *Empresa Siderurgica, S.A.* v. *County of Merced*, 337 U.S. 154 (1949).*

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* See generally Hartman, *State Taxation of Interstate Commerce: A Survey and an Appraisal*, 46 Va. L. Rev. 1051, 1086-1093 (1960). Professor Hartman accurately summarizes the law as follows:

"If . . . the break in the interstate excursion is temporarily caused by the necessity of the trip, is necessarily incident to the method of transit, or is for the purpose of convenience and safety in the course of movement, then the commerce clause prohibits state taxation. Under this approach to the question of taxability, such formalities as the form of billing and changes in the method of transportation do not affect the continuity of the interstate operation so as to afford a taxable toe-hold to the state." *Id.* at 1089. (Citations omitted.)

The record demonstrates that the fuel purchased by United in Indiana is on a continuous interstate journey through Illinois within the rule delineated in *Blasius*. The fuel is purchased by United for its interstate and foreign flight operations, and it is transported by common carrier from Indiana to storage facilities at O'Hare and Midway airports where it is held for a minimum of 2 days (during which period the fuel is settled and filtered to eliminate impurities arising from the pipeline shipment) to a maximum of 12 days, averaging 2 to 6½ days. (Stip. ¶¶ 6, 7, App. 38.) From the storage facilities, the fuel is directly piped or trucked to the waiting aircraft. The fuel remains in Illinois only so long as necessary for certain purification processes, and from there it is pumped into the tanks of United's aircraft, almost always immediately prior to departure time. (Stip. ¶ 7, App. 36.) Of this fuel loaded in the aircraft tanks, almost all of it is carried from Illinois and is consumed over other states. In fact, depending on the type of aircraft, at least 35 to 60% of the fuel loaded in Chicago is burned after the aircraft has landed in another state and is continuing on the next leg of its interstate journey. Of the 250,000,000 gallons passing through Illinois each year, loaded on some 85,000 departing flights, only small amounts are burned in Illinois on about 3.7% of those departures. (See United's main Brief, pp. 11-16, 46 n.)

Not only is the flow of the fuel through Illinois continuous except for exigencies of its transportation, but the Illinois Supreme Court itself concluded that United *intended* to store the fuel in Illinois *only* to facilitate its interstate operations.*

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* "United does not store [the fuel] in Illinois with any intention that the fuel will be used solely outside this State. Rather, *the fuel is stored here only to facilitate United's* [*interstate*] *operations from the O'Hare and Midway airports within the State.*" (Emphasis added.) (App. 202.)

As stated in *Independent Warehouses* v. *Scheele*, 331 U.S. 70, 80 (1947):

> "A characteristic feature of those cases in which the state has been allowed to tax property which has come to rest after an interstate journey is that at the time the tax is laid *it cannot be determined what the ultimate destination or use of the property may be.*" (Emphasis added.)

In contrast, in the instant case the exclusive consumption of the fuel by interstate flights (almost entirely outside Illinois) is known from the time of purchase from Shell in Indiana. See also *Interstate Gas Co.* v. *Federal Power Commission*, 331 U.S. 682, 687-689 (1947). This fact also distinguishes the situation from that of *Nashville C. & St. L. Ry.* v. *Wallace, supra*, 288 U.S. at 266, and *Edelman* v. *Boeing Air Transport, supra*, 289 U.S. at 251, where the stored fuel was interchangeably used in varying amounts for both local and interstate movements.

Therefore, it is apparent from the facts of the case that no taxable situs has been acquired in Illinois. On the contrary, its presence in Illinois, averaging from 2 to 6½ days, was entirely during an interstate movement which under the decisions of this Court is immune from State taxation.

This immunity is of crucial importance where the tax is a use tax imposed on all the fuel passing through United's storage facilities at the Chicago airports during a year, in contrast to a property tax which would affect only the quantity of fuel stored in Illinois on the assessment date.

## II. Application of the Illinois Use Tax to United's Fuel Loaded in Chicago Would Subject That Fuel to Multiple Taxation in Violation of the Commerce Clause.

Part IB of the State's brief is a melange of conjecture and hypothetical issues. United has never contended that

the Illinois Use Tax Act is *per se* unconstitutional, but only that it could not be constitutionally applied to the act of loading fuel into aircraft about to depart on interstate or foreign flights. Thus, the State's reference to *Henneford* v. *Silas Mason Co.*, 300 U.S. 577 (1937), is no more apposite to the issues of this case than the authority cited by the State in Part IA of its brief, all of which involved imposition of a state tax on goods after or before their movement or use in interstate commerce. *Henneford* merely held that a use tax could be applied to materials that come to rest in a State after having moved in interstate commerce. The incidence of the tax Illinois seeks to impose is not on property that has come to rest within the State, but is rather on fuel which is veritably " 'taking off' in appellant['s] carrier into commerce; in reality the tax is, therefore, on the exit of the gas from the State." *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 167 (1954).

Another group of arguments raised by the State is that there is no multiple taxation involved here because (i) there is nothing in the record that Shell Oil actually pays the Indiana gross income tax on its sales of fuel to United; (ii) that even if Shell pays the tax it is doing so as a volunteer because the regulations under the Indiana gross income tax exempt sales for delivery outside that State; (iii) but even if Shell is properly paying the tax on these sales, United *may* be entitled to a credit against its Illinois tax liability for the Indiana tax that is paid on the purchase of the fuel.

The first contention is no more than a quibble over the meaning of the parties' stipulation that "since May 1, 1953, Shell Oil Company has collected from United the Indiana Gross Income Tax measured by the purchase price of [the fuel] paid by United to Shell Oil Company." (Stip. ¶ 13, App. 41. See Tr. 154-156, 407, App. 102-104, 183.) No one

heretofore has raised the improbable hypothesis that Shell does not pay its gross income tax to Indiana.*

The State's assertion that Shell may be unnecessarily paying the Indiana gross income tax on these sales is unsound. All elements of the sales from Shell to United occur in Indiana—acceptance of the order, passage of title and risk of loss, delivery to the purchaser, and payment—and therefore, it is an Indiana sale subject to the Indiana gross income tax. See *International Harvester Co.* v. *Department of Treasury*, 322 U.S. 340 (1944); *Department of Treasury* v. *Wood Preserving Corp.*, 313 U.S. 62, 66 (1941), distinguishing *Adams Manufacturing Co.* v. *Storen*, 304 U.S. 307 (1938). The Indiana tax regulation cited in the State's brief deals with sales in which delivery occurs outside of Indiana to an out-of-state purchaser, the receipts from which, under decisions of this Court such as *Adams Manufacturing Co.* v. *Storen, supra*, may not be subjected to an unapportioned gross income tax. But, as the parties stipulated, and as the trial court and Illinois Supreme Court concluded, what is involved in the instant case is a sale and delivery in Indiana subject to the Indiana gross income tax.**

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* The State concedes, however, that "[t]he record clearly establishes that United by contractual obligation pays to Shell Oil Company an annual dollar amount that equals what Shell would pay to the State of Indiana if the purchase price of the sale of fuel to United was included in the gross receipts measuring the Indiana gross income tax." (Brief, p. 38.)

** It is significant that the Illinois Department of Revenue audited Shell for some of the years in question to determine whether it owed any Illinois retailers' occupation tax or use tax because Shell sold the fuel in question to United in Illinois rather than Indiana. The audit did not lead to any assessment of tax on this theory. (Tr. 431, 436-437, App. 184-185.) It is also relevant that United holds an Indiana wholesale fuel distributor's license because the laws of that state require such a license as a prerequisite to taking delivery of large quantities of fuel in Indiana. (UA Ex. 32, Tr. 365, App. 180; Tr. 364, App. 179-180.)

The State's contention that there is no multiple taxation in the instant case because United may be entitled to a credit in Illinois for the Indiana tax paid is irrelevant to the issues before this Court.* Actually, the State's brief (pp. 39-41), contradictorily argues that there is no multiple tax on United because it may be entitled in Illinois to a credit for the Indiana tax, while it concurrently contends that United is not entitled to any such credit except for a previously paid *sale or use* tax.

To start with fundamentals, a credit against the Illinois 4% use tax for a ½% Indiana gross income tax does not prevent multiple taxation of this fuel. It would do so only under the fortuitous circumstance that the Indiana rate equalled or exceeded the Illinois rate, which is not now and never has been the situation.**

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* This Court should be aware that United asserted from the outset of this case that any Illinois use tax imposed on its loading of the fuel at the Chicago airports should be reduced by the amount of Indiana gross income tax that was imposed on the purchase of the same fuel. Neither the trial court nor the Illinois Supreme Court decided that issue. Before the Illinois courts the State vigorously claimed that United is not entitled to any credit because, among other things, the Illinois credit is available only for sales and use taxes paid to another jurisdiction, in contrast to a tax such as the Indiana gross income tax involved in the present case. The State has reasserted the latter objection in its brief to this Court (p. 41).

** Except by chance, a credit does not effect a fair apportionment of taxes between the states involved according to the activities in each of those states. The amount of the credit depends solely on the relationship of its tax rates to those of the first state that has imposed a tax on the transaction. This is to be contrasted with true apportionment, such as would exist under the alternative argument in United's main brief (pp. 44-50), under which Illinois would be permitted to impose use tax only on the fuel actually burned in that state. To the same effect is the apportionment of receipts based on mileage in *United Air Lines* v. *Porterfield*, 28 Ohio St.2d 97, 276 N.E.2d 629 (1971), appeal dismissed, 92 S.Ct. 2461 (1972) (discussed at pp. 1-2, *supra* and pp. 18-19, *infra*).

The fact is that, if Illinois is permitted to impose the use tax on the fuel, there will be double taxation. The "operating incidence," *American Oil Co.* v. *Neill*, 380 U.S. 451, 455 (1965), of both the Indiana gross income tax and the Illinois use tax is the same. They are both privilege taxes measured by gross receipts—the selling price of the taxed property. Therefore, if the Illinois use tax is applied to all fuel loaded in Illinois, United will be subject to direct multiple state taxation which has been consistently prohibited by this Court. (See discussion at pp. 33-36 of United's main Brief.)

In addition to the actual multiple taxation of this fuel by Indiana and Illinois, there is an additional potential multiple tax burden—which would be ineligible for any Illinois tax credit. At present United pays Illinois use tax on fuel consumed on its intrastate flights between Chicago and Moline, which United concedes can be imposed by a state without running afoul of the prohibitions of *Helson and Randolph* v. *Kentucky*, 279 U.S. 245 (1929).

The record shows that United serves 49 similar intrastate segments daily in other states by flights departing from Chicago. (See Exhibit B to this Brief.) As the volume of fuel loaded at Chicago indicates, and the brief time on the ground at these smaller airports confirms (United Exhibit 6), these flights are not refueled at each small intermediate point such as Cedar Rapids, Saginaw, Columbus, or the like. California, Colorado, Indiana, Iowa, Michigan, Nebraska, New York and Ohio, in which these flights operate, can exercise the same intrastate taxing power as does Illinois. This means that United's fuel loaded at Chicago (all of which Illinois seeks to tax) could be taxed again as it is consumed on intrastate segments of almost 17,000 flights annually. The potential multiple tax burden is real and substantial.

This prospect seems more likely since this Court, 92 S.Ct. 2461 (1972), has refused jurisdiction of the appeal in *United*

*Air Lines* v. *Porterfield*, 28 Ohio St.2d 97, 276 N.E.2d 629 (1971), which held that the Commerce Clause did not invalidate a state excise tax on the privilege of engaging within Ohio in air transportation of persons and property, imposed at a rate of 4% on gross receipts derived from such transportation, where the receipts from interstate flights were apportioned on the basis of mileage in and outside of Ohio. It would seem that if gross receipts from interstate air transportation may be apportioned according to mileage in and outside of a state, so also fuel consumed on such flights, if taxable at all, constitutionally may be subject to use tax only on a fairly apportioned basis.

This Court has recognized that the availability of an interstate tax credit is not relevant in determining the validity of a state tax under the Commerce Clause. In both *Henneford* v. *Silas Mason Co.*, 300 U.S. 577, 583-585 (1937) and *Southern Pacific Co.* v. *Gallagher*, 306 U.S. 167, 172, 174-175 (1939), this Court found that a use tax could be imposed on goods that were at rest in the state after an interstate movement, and in the latter case before the goods were incorporated in an interstate railway system. In the former case, a credit existed for the other state taxes previously paid; in the latter case, no such credit existed. In both cases, this Court indicated that the existence of the credit was not determinative.

In those cases, this Court correctly saw that an interstate tax credit does not affect constitutionality under the Commerce Clause because it does not affect the existence of the burden on the commerce, and as this Court has said in *Spector Motor Service* v. *O'Connor*, 340 U.S. 602, 609 (1951):

> "This Court heretofore has struck down, under the Commerce Clause, state taxes upon the privilege of carrying on a business that was *exclusively* interstate

in character. The constitutional infirmity of such a tax persists no matter how fairly it is apportioned to business done within the state. . . ."*

This principle is unequivocally applicable here. Under the authority of *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157 (1954), and related cases, a state is forbidden to tax an integral aspect of interstate commerce, such as the loading of fuel aboard aircraft prior to their departure in interstate commerce. Therefore, even if the impact of such a tax were *reduced* by a credit for taxes properly paid to another jurisdiction, the vice of the Illinois tax remains —a direct and unconstitutional imposition upon an integral aspect of interstate commerce.**

**III. The Sales of Fuel in the Instant Case Were Not Made in Illinois, but Even If They Were Illinois Sales (which Constitutionally Could be Subject to an Illinois Sales Tax), It Does Not Follow that Illinois can Impose a Use Tax on the Loading of the Fuel.**

The State's final contention is, in essence, that United's purchases of fuel from Shell in Indiana actually are Illinois sales, which Illinois constitutionally could tax even though intended for consumption by interstate flights, and therefore it may also impose use tax upon the loading of that fuel in Illinois. This is factually and legally unsound.

This argument—which was not made below—ignores the explicit findings of both the Illinois trial and Supreme

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* Similarly, as Mr. Justice Frankfurter stated for the Court in *Freeman* v. *Hewit*, 329 U.S. 249, 256 (1946):

> "[T]here is [no] warrant in the constitutional principles heretofore applied by this Court to support the notion that a State may be allowed one single-tax-worth of direct interference with interstate commerce."

** The Illinois use-privilege tax, as applied to United in the present case, also amounts to a tax upon the *privilege* of engaging in an indispensable aspect of interstate commerce forbidden by *Spector Motor Service* v. *O'Connor*, 340 U.S. 602 (1951); see *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 458 (1959).

Courts that all of the fuel was sold and delivered by Shell to United in Indiana. (See pp. 3-4, *supra.*) The Illinois Supreme Court's holding that the use tax was due on all the fuel loaded at the Chicago airports was *not* based on a finding that United purchased the fuel in Illinois. It is therefore improper for the appellees to ask this Court to make a finding of fact contrary to that made below.

In any event, this argument is fallacious. In contending that Illinois may tax the Indiana sales from Shell to United, the State relies primarily on *McGoldrick* v. *Berwind-White Co.*, 309 U.S. 33, 58 (1940) and *International Harvester Co.* v. *Department of Treasury*, 322 U.S. 340, 345, 348 (1944), which respectively involved the imposition of the New York City sales tax and the Indiana gross income tax on sales that involved *delivery of the goods to the customer in the taxing jurisdiction.* Thus, these cases actually support the opposite position than that for which the State's brief has invoked it. Since orders for United's fuel were placed with Shell in Indiana (Tr. 302-304, App. 157-158), and transfer of possession, delivery and payment for United's fuel all occurred in Indiana (*e.g.*, Tr. 254-259, 302-304, 369, App. 143-146, 157-158, 182), it is that State which has the power to tax the sales transaction, not Illinois.

Indeed, the facts of the present case are similar to those in *McLeod* v. *Dilworth Co.*, 322 U.S. 327 (1944), which invalidated an Arkansas sales tax on goods ordered from a Tennessee corporation, with delivery to a carrier in Tennessee at which time title passed to the buyer, and payment for the goods in Tennessee. As this Court described the transactions, "sales [were] made by Tennessee vendors that are consummated in Tennessee for the delivery of goods in Arkansas." 322 U.S. at 328.*

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* Nor are the other cases cited by the State, such as *Eastern Air Transport* v. *Tax Commission*, 285 U.S. 147 (1932), of any aid to its position. They merely stand for the unremarkable proposition that a state may tax a sale consummated within its jurisdiction. They have no application to the instant situation, where the State asserts the power to tax a sale which occurs in another state. So, also, in

More recently, in *American Oil* v. *Neill*, 380 U.S. 451 (1965), this Court invalidated, on due process grounds, an Idaho motor fuel license tax upon a seller doing business in that state for sales consummated outside Idaho. This Court summarized the facts as follows (380 U.S. at 458):

> "Each and every phase of the transaction had its locus outside of Idaho [the taxing State]: invitations for bids were issued by the Government in Seattle, Washington; Utah Oil [the seller] submitted its bids from Salt Lake City; the bids were accepted in Seattle; the contract called for delivery of the gasoline f.o.b. Salt Lake City; Utah Oil delivered the gasoline to Salt Lake City, and it was there that title passed [to the buyer]."

This Court rejected, 380 U.S. at 457-459, Idaho's contention that it could impose tax on these sales because the seller (i) sold the gasoline with knowledge that it would be imported into and used within Idaho, and (ii) was authorized to do business in Idaho as a distributor of motor fuels.*

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*Department of Treasury* v. *Ingram-Richardson Mfg. Co.*, 313 U.S. 252 (1941), this Court sustained Indiana's taxation of a corporation having a factory in that state at which it manufactured enamel and applied it to metal articles transported from other states, on the basis that "the entire service was in aid of the enameling business conducted within the State. The transportation of the metal parts to and from Indiana were but incident to that intrastate business . . ." 313 U.S. at 255.

* In rejecting the first contention, this Court stated, *id.* at 457-458:

> "The mere fact that Utah Oil knew that the gasoline was to be imported into Idaho merits little discussion. More than once this Court has struck down taxes directly imposed on or resulting from out-of-state sales which were held to be insufficiently related to activities within the taxing State, despite the fact

But even if these purchases were made in Illinois so that Illinois could impose a sales tax on them, the State's brief cites no authority—and United believes there is none—to support its argument that this consequently permits Illinois to impose a use tax on the loading of fuel into aircraft about to depart on interstate or foreign flights.*

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that the vendor knew that the goods were destined for use in that State. *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340 (use tax); *Norton Co.* v. *Department of Revenue*, 340 U.S. 534 (gross receipts tax); *McLeod* v. *J. E. Dilworth Co.*, 322 U.S. 327 (sales tax).

"These cases have also firmly established the doctrine that when a tax is imposed on an out-of-state vendor, 'nexus' between the taxing State and the taxpayer is the outstanding prerequisite on state power to tax. Consistent with this requirement there must be 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.' *Miller Bros. Co.* v. *Maryland, supra*, at 344-345."

* The converse of this proposition has been forcefully disposed of in *McLeod* v. *Dilworth Co.*, 309 U.S. 327, 330-331 (1944):

". . . A sales tax and a use tax in many instances may bring about the same result. But they are different in conception, are assessments upon different transactions, and in the interlacings of the two legislative authorities within our federation may have to justify themselves on different constitutional grounds. A sales tax is a tax on the freedom of purchase—a freedom which wartime restrictions serve to emphasize. A use tax is a tax on the enjoyment of that which was purchased. In view of the differences in the basis of these two taxes and the differences in the relation of the taxing state to them, a tax on an interstate sale like the one before us and unlike the tax on the enjoyment of the goods sold, involves an assumption of power by a State which the Commerce Clause was meant to end. The very purpose of the Commerce Clause was to create an area of free trade among the several States. That clause vested the power of taxing a transaction forming an unbroken process of interstate commerce in the Congress, not in the States."

## CONCLUSION

Surfacing repeatedly in the State's brief is the innuendo that United is engaged in a tax avoidance scheme designed to deprive Illinois of its right to tax every drop of fuel that United loads on its interstate flights in Chicago.*

This view overlooks the fact that United pays for the services provided by the City of Chicago and the State of Illinois by fully compensatory fees for the construction, support and maintenance of the Chicago airports, and for more intangible benefits received from Illinois and its subdivisions by Illinois income, use and property taxes.

The State also finds it difficult to focus on the reality that the fuel's presence in Illinois is transitory: its interstate journey commences in Indiana, and rests in Illinois only so long as the exigencies of its own transportation and the needs of United's interstate operations require. Essentially all of it is then carried from the State in the tanks of United's aircraft and is burned in other States, 35 to 60% of it after the flight has landed in another State and is on another leg of its interstate journey.

It is these facts, rather than a putative tax avoidance scheme prophetically concocted two years before the Illinois Use Tax Act was enacted, against which the real issue of this case is framed.

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* But as Judge Learned Hand once wrote:

"Over and over again courts have said that there is nothing sinister in so arranging one's affairs as to keep taxes as low as possible. Everybody does so, rich or poor; and all do right, for nobody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary contributions. To demand more in the name of morals is mere cant." *Commissioner* v. *Newman*, 159 F.2d 848, 850-851 (2nd Cir. 1947) (dissenting opinion), quoted with approval in *Atlantic Coast Line* v. *Phillips*, 332 U.S. 168, 173 (1947).

That issue is simply whether Illinois can exact additional revenue from United by imposition of a privilege-use tax upon the act of loading fuel aboard its aircraft immediately prior to their interstate journeys which consume the fuel. It is this particular imposition by the State upon an integral aspect of interstate commerce which United contends is constitutionally impermissible.* *E.g., Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 166-169 (1954).

For the reasons stated herein and in its main brief, United requests this Court to reverse the judgment of the Supreme Court of Illinois and to prohibit the imposition of the Illinois use tax on United's fuel which is loaded aboard its aircraft in Chicago for departure in interstate and foreign flights, or, in the alternative, if this case is considered to fall within the area where the apportionment rule properly applies, that Illinois be permitted to tax only that portion of the fuel which is consumed in or over Illinois on United's flights departing from Illinois.

Respectfully submitted,

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* Alternatively, United contends that Illinois may not constitutionally deny United the benefit of a statutory exemption for property temporarily stored in Illinois because, and only because, the temporary storage is to facilitate United's interstate operations from the Chicago airports. See United's main Brief, pp. 30-32.

## EXHIBIT A

### PROCEDURES BY WHICH UNITED AIR LINES PURCHASES AVIATION FUEL FROM SHELL OIL COMPANY IN INDIANA

All of the fuel loaded aboard United's interstate and foreign flights departing from O'Hare and Midway airports in Chicago is purchased from Shell Oil Company at its terminal at East Chicago and Hammond, Indiana, at which point title, possession and risk of loss to the fuel pass to United. Shell has no property or interest in, nor do its employees or agents have anything to do with, that fuel after delivery at its northern Indiana Terminal.*

That the risk of loss shifts to United at Shell's Terminal is underscored by the procedures employed by Shell and West Shore Pipe Line Company in billing United for fuel deliveries and transportation charges. Shell bills United at the contract price for the amount of fuel which it delivers to the West Shore receiving meters at the Indiana terminals of the West Shore line. When the fuel is delivered to United at Des Plaines, Illinois, near O'Hare Airport, it is metered from the West Shore line, which usually show about 150 to 175 barrels less than the meter reading at the Indiana end of the line. (The shortage is caused by the intermixture of adjoining slugs of fuel during pipeline movement.) West Shore issues United a credit for the value of the shortage. (Tr. 328-329, 364, App. 165-166, 179.)

The detailed evidence relating to the sale and delivery of the turbine fuel and aviation gasoline by Shell to United, and its shipment by United to Midway and O'Hare airports can be summarized in tabular form.

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* This was confirmed by the Department of Revenue's audit of Shell for the Illinois retailers' occupation (sales) tax through the calendar year 1965. (Tr. 431, 436-437, App. 184-185.)

| | O'Hare | | Midway | |
|---|---|---|---|---|
| | Turbine Fuel | Aviation Gas | Turbine Fuel | Aviation Gas |
| (1) All sales and deliveries pursuant to fuel contracts signed in New York. (UA Exs. 28-31, Tr. 357) | Yes | Yes | Yes | Yes |
| (2) Fuel orders to Shell placed by (UA Exs. 33, 38, Tr. 368, 406; App. 182; Tr. 296-297, 350-351, 367; App. 156-157, 174, 181) | Lockheed Air Terminal, Inc., as Agent for United | | Butler Aviation Company as Agent for United | |
| (3) Form of fuel order (Tr. 302-303, 350-351; App. 157-158, 174) | Written with oral amendments | Oral | Oral | Oral |
| (4) Frequency of orders (Tr. 297, 302; App. 156-157) | 10th of preceding month for three shipments in next month; irregular oral amendments | Irregular | Irregular | Irregular |
| (5) Orders accepted by Shell at (Tr. 302-303; App. 157-158) | Shell's East Chicago Terminal Office | | | |
| (6) Frequency of shipment (Tr. 297, 302; App. 156-157) | 1st, 10th and 20th of each month | Irregular | Irregular but frequent | |
| (7) Title passes to United (UA Exs. 28-31, Tr. 357) | At receiving meters of West Shore Pipe Line Co., Hammond, Indiana | | At Shell's truck termin East Chicago, Indiana | |
| (8) Place of "delivery" under contract* (Tr. 354-359, 303-304; App. 143-146, 158) | " | " | " | " |
| (9) Risk of loss passes under contract (UA Exs. 28-31, Tr. 357) | " | " | " | " |
| (10) Shell's insurance on product ceases (Tr. 218, 304; App. 132, 158) | " | " | " | " |
| (11) United's insurance on product commenced (Tr. 227-228, 312; App. 165, 168) | " | " | " | " |
| (12) Shell's agents' or employees' services incident to fuel after point of delivery in Indiana (Tr. 214, 219, 222, 245, 254-262, 358, 366-367; App. 129-130, 132, 134, 141-145, 175, 180-181) | None | None | None | None |

* United holds an Indiana Motor Fuel Distributor's License because it receives large quantities of fuel in Indiana (UA Ex. 32, Tr. 365, App. 180; Tr. 364, App. 179-180).

| | O'Hare | | Midway | |
|---|---|---|---|---|
| | Turbine Fuel | Aviation Gas | Turbine Fuel | Aviation Gas |
| (13) United's common carrier from Indiana to airport (UA Ex. 37, Tr. 396; Tr. 258, 303; App. 145, 157-158) | West Shore Pipe Line Company | | Rogers Cartage Company | |
| (14) Orders to carrier placed by (Tr. 350-351; App. 174-176) | Lockheed | Lockheed | Butler | Butler |
| (15) Responsibility to United for loss or shortage on fuel during shipment (UA Ex. 37, Tr. 396; Tr. 328; App. 165-166) | West Shore under ICC tariff | | Rogers Cartage per paragraph 5 of its contract with United | |
| (16) Fuel identified as United's during shipment (Tr. 330; App. 166-167) | Yes | Yes | Yes | Yes |
| (17) Invoices from—to (Tr. 367, 369; App. 160, 182) | Shell's Indianapolis, Indiana office to United's Des Plaines, Illinois office | | | |
| (18) Method and place of payment (Tr. 369; App. 183) | By check directly to Shell's Indianapolis office | | | |
| (19) Invoices from carriers (Tr. 364; App. 179) | Directly by West Shore to United | | By Rogers Cartage directly to United | |
| (20) Shell's ownership of or management participation in United's fueling agents (Tr. 400, 401; App. 181, 182-183) | Lockheed—none | | Butler—none | |
| (21) Shell's ownership interest in United's common carriers (Tr. 216-218, 254, 304-305; App. 131-132, 144, 159) | West Shore—20% with 9 other shareholders; elects one of 10 directors; no officers or management responsibility | | Rogers Cartage—none | |
| (22) Shell's participation in United's common carriers' management (456) | West Shore—none | | Rogers Cartage—none | |

## EXHIBIT B

## ANALYSIS OF INTRASTATE FLIGHT SEGMENTS OF AIRCRAFT DEPARTING FROM CHICAGO

### (United Exhibit 6)*

| United Ex. 6 Page No. | Flight Number | Intrastate Segment | Potential Taxing State |
|---|---|---|---|
| 4 | 743 | Cedar Rapids-Des Moines | Iowa |
| | | Omaha-Lincoln | Nebraska |
| 5 | 857 | Omaha-Lincoln | " |
| | | Denver-Grand Junction | Colorado |
| 6 | 483 | Sacramento-San Francisco | California |
| 6 | 419 | Los Angeles-San Diego | " |
| 6 | 103 | Los Angeles-San Diego | " |
| 8 | 109 | Los Angeles-San Diego | " |
| 9 | 273 | Sacramento-San Francisco | " |
| 12 | 235 | Sacramento-San Francisco | " |
| 12 | 779 | Cedar Rapids-Des Moines | Iowa |
| 15 | 117 | Los Angeles-San Diego | California |
| 20 | 316 | Dayton-Columbus | Ohio |
| 21 | 732 | South Bend-Fort Wayne | Indiana |
| 21 | 700 | Saginaw-Flint | Michigan |
| 21 | 366 | Buffalo-Rochester | New York |
| 21 | 758 | Muskegon-Lansing | Michigan |
| 21 | 338 | Akron-Youngstown | Ohio |
| 22 | 714 | Saginaw-Flint | Michigan |
| | | Flint-Detroit | " |
| 22 | 364 | Buffalo-Rochester | New York |
| 23 | 708 | Grand Rapids-Detroit | Michigan |
| 23 | 756 | South Bend-Fort Wayne | Indiana |
| 23 | 604 | Muskegon-Lansing | Michigan |
| | | Lansing-Detroit | " |
| 25 | 246 | South Bend-Fort Wayne | Indiana |
| 25 | 334 | Buffalo-Rochester | New York |
| 25 | 276 | Akron-Youngstown | Ohio |
| 26 | 850 | Dayton-Columbus | " |

| United Ex. 6 Page No. | Flight Number | Intrastate Segment | Potential Taxing State |
|---|---|---|---|
| 26 | 808 | Saginaw-Flint | Michigan |
| 26 | 660 | Grand Rapids-Lansing | " |
| 27 | 790 | Toledo-Cleveland | Ohio |
| 27 | 746 | South Bend-Fort Wayne | Indiana |
| 27 | 672 | Saginaw-Flint | Michigan |
| | | Flint-Detroit | " |
| 29 | 408 | Columbus-Dayton | Ohio |
| 29 | 610 | Akron-Youngstown | " |
| 29 | 608 | South Bend-Fort Wayne | Indiana |
| 29 | 214 | Buffalo-Rochester | New York |
| 30 | 728 | Saginaw-Detroit | Michigan |
| 30 | 630 | Flint-Detroit | " |
| 31 | 722 | Muskegon-Saginaw | " |
| | " | Saginaw-Flint | " |
| | " | Flint-Detroit | " |
| 32 | 784 | Grand Rapids-Lansing | " |
| | " | Lansing-Detroit | " |
| 33 | 370 | Buffalo-Rochester | New York |
| 51 | 9999 | Los Angeles-San Francisco | California |

* Illinois intrastate flights for which United pays fuel tax not included.

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

# SUPREME COURT OF THE UNITED STATES

Syllabus

## UNITED AIR LINES, INC. *v.* MAHIN, DIRECTOR OF DEPARTMENT OF REVENUE, ET AL.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

No. 71-862. Argued November 8, 1972—Decided March 5, 1973

The Illinois use tax was applied to appellant's aviation fuel stored in the State and loaded aboard its aircraft there and consumed in interstate flights, the tax authorities having revised their previous "burn off" interpretation of a statutory exemption for temporary storage. Under the "burn off" interpretation only fuel consumed in flight over Illinois was used to measure the tax imposed for storage before loading, but under the reinterpretation all fuel loaded was deemed to measure the tax on the "use" of storage or withdrawal from storage. The Illinois Supreme Court upheld the statute against appellant's contention that the tax as reinterpreted impermissibly burdened interstate commerce. *Held:*

1. The statute as authoritatively construed by the State's highest court to tax storage and not consumption does not place an unconstitutional burden on interstate commerce. *Edelman* v. *Boeing Air Transport, Inc.*, 289 U. S. 249; *Nashville, Chattanooga & St. Louis R. Co.* v. *Wallace*, 288 U. S. 249. Cases allowing the taxation of storage of fuel before loading have not outlived their usefulness. Pp. 3-7.

2. The "burn-off" rule is not unconstitutional, being distinguishable from a tax imposed on consumption such as was invalidated in *Helson* v. *Kentucky*, 279 U. S. 245. Since some of the Illinois Supreme Court majority were under the mistaken impression that *Helson* precluded use of the "burn off" interpretation, the case is remanded to enable that court to construe the temporary storage provision under state law free from any constraint that such interpretation would not be constitutionally permissible. Pp. 7-9.

49 Ill. 2d 45, 273 N. E. 2d 585, vacated and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in which STEWART and WHITE, JJ., joined. WHITE, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

# SUPREME COURT OF THE UNITED STATES

No. 71–862

United Air Lines, Inc., Appellant, v. George E. Mahin et al. | On Appeal from the Supreme Court of Illinois.

[March 5, 1973]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

United Air Lines, Inc., challenged the constitutionality of the Illinois general revenue use tax as applied to aviation fuel stored in Illinois and then loaded aboard aircraft there and consumed in interstate flights. The Supreme Court of Illinois upheld the state tax as currently applied, concluding that it did not impose an unconstitutional burden on interstate commerce. 49 Ill. 2d 45, 273 N. E. 2d 585 (1971). We noted probable jurisdiction. 405 U. S. 986 (1972). We now affirm that holding, but we vacate the judgment and remand the case for consideration of an issue under state law.

Since 1953 United has purchased aviation fuel from a supplier for delivery from the supplier's Indiana facilities. This fuel is utilized by United in its extensive operations out of O'Hare and Midway airports in the Chicago area of Illinois. Although the method of delivery varies for different types of fuel and for the two airports,[1] all fuel is delivered by common carrier and is held for periods ranging from two to 12 days in ground storage facilities

[1] Turbine (jet) fuel for use at O'Hare is shipped by common carrier pipeline from the supplier's Indiana terminals to a 15-million-

maintained in Illinois by United.[3] Fuel for both interstate and intrastate operations is delivered in the same manner.[4] United voluntarily has paid the tax on fuel consumed in purely intrastate operations. Only the tax as applied to fuel used in interstate flights is in issue.

In 1955 Illinois enacted a general tax on the "privilege of using" tangible personal property in the State. Ill. Rev. Stat. c. 120, § 439.3 (1971). "Use" was defined to include the "exercise . . . of any right or power over tangible personal property incident to the ownership of that property." Some exceptions from this inclusive definition were made. One of these exceptions, which, the statute recites, § 439.3, is "[t]o prevent actual or likely multistate taxation," is the temporary storage provision. This denies application of the tax to property brought from another State and stored temporarily in Illinois before use solely outside the State.[5]

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gallon storage facility at Des Plaines, Illinois. Appendix 168–169. Normally, three deliveries are made each month to this facility. Appendix 129. Smaller quantities of fuel are transferred by pipeline to facilities maintained by United at O'Hare.

Turbine fuel for use at Midway and aviation gasoline for both airports is transported from Indiana by common carrier tank truck to airport storage facilities. Appendix 159.

[3] The parties have stipulated that the period of storage ranges from two to 12 days. Appendix 38. The Des Plaines storage facilities are not owned by United; it and another airline jointly lease the facilities. United shares in the cost of repairs, the risk of loss, and the employment of a managing agent. Appendix 132, 168.

[4] Appendix 173–174. United uses fuel from the storage facilities for its intrastate training flights and for the intrastate leg of flights that stop at both Chicago and Moline, Illinois. 49 Ill. 2d, at 47–48, 273 N. E. 2d, at 586. United also engages in intrastate charter flights. Appendix 37 n. 6.

[5] The temporary storage provision excepts

"(d) the temporary storage, in this State, of tangible personal property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, is used

Since this general use tax, apart from its exceptions, reached all tangible personal property, it applied by its terms to fuel stored for use in vehicles. From 1955 to 1963 the Illinois Department of Revenue allowed interstate common carriers to benefit from the temporary storage provision to the extent that fuel, although loaded aboard in Illinois, was not consumed by the vehicle in that State. The amount of aviation fuel used over Illinois could be calculated because scheduled airline routes are precise and the rate of consumption by each type of aircraft is known. This "burn off" interpretation was changed in 1963, however, when the Department announced by bulletin that it was reinterpreting the temporary storage provision to mean that "temporary storage ends and a taxable use occurs when the fuel is taken out of storage facilities and is placed into the tank of the airplane, railroad engine or truck." Thus, as the Illinois court described it, "all fuel loaded on United's planes at the two airports was deemed to measure the tax." 49 Ill. 2d, at 49, 273 N. E. 2d, at 587.

United's suit attacked the new interpretation on both state and federal grounds. All justices of the Supreme Court of Illinois agreed that the new interpretation did not run afoul of the Federal Constitution, but the justices disagreed over the applicability and validity of the "burn off" alternative discussed in the several opinions. 49 Ill. 2d, at 50–53, 56, 57–59, 273 N. E. 2d, at 587–589, 591, 591–592.

## I

Two decisions of this Court were relied upon by the Illinois court in reaching its conclusion that the present application of the state tax was not offensive to the

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solely outside this State or physically attached to or incorporated into other tangible personal property that is used solely outside this State." § 439.3.

Federal Constitution. The cases are *Edelman* v. *Boeing Air Transport, Inc.*, 289 U. S. 249 (1933), and *Nashville, Chattanooga & St. Louis R. Co.* v. *Wallace*, 288 U. S. 249 (1933). We agree that these cases support the application of the Illinois tax to all fuel stored in Illinois and loaded aboard United's aircraft for in-flight consumption.

In *Edelman* this Court upheld a state gasoline use tax, even when imposed on gasoline imported from outside the State, stored in tanks at an airport, and loaded aboard planes departing on interstate flights. The decision in *Edelman* followed the holding in *Nashville* that oil purchased by a railroad outside Tennessee but stored in Tennessee solely for the purpose of providing motive power for the railroad's interstate and intrastate operations could be subjected constitutionally to a Tennessee privilege tax. In *Nashville*, as in this case, none of the fuel stored was held as inventory for sale, and the tax was not one for the use of special services furnished by the State to the taxpayer railroad.

In *Edelman* the Court accepted the State's determination that the taxable event was withdrawal from storage rather than consumption. 289 U. S., at 251. The airline in *Edelman* contended, *id.*, at 252, that the state tax was invalid under *Helson* v. *Kentucky*, 279 U. S. 245 (1929). In *Helson* the Court held that a Kentucky tax on the use of gasoline within the State fell too directly on interstate commerce when it was imposed on fuel loaded in Illinois but consumed in the course of an interstate ferry's trip through Kentucky. In *Edelman* the Court distinguished *Helson* because storage, rather than consumption, was the taxable event. See *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167 (1939).

The Supreme Court of Illinois characterized the taxable "use" under the Illinois statute as either storage or withdrawal from storage. United argued in the state

court that the temporary storage provision constituted a legislative waiver of the right to tax storage prior to loading. The Illinois court rejected this contention, noting that United stored fuel at the airport for general use. On these facts, the Supreme Court of Illinois concluded that the Illinois use tax applied to storage by United before loading and that this application was constitutional:

> "Under the circumstances, the storage becomes something more than a temporary storage for safekeeping prior to its use solely outside of Illinois. Such storage, under the plain words of the statute, does not qualify under the temporary storage exemption and, as the authorites already discussed reveal, *either the storage itself or the withdrawal therefrom are uses which may be taxed without offending the commerce clause of the Federal Constitution.*" 49 Ill. 2d, at 55–56, 273 N. E. 2d, at 590 (emphasis added).

The Illinois dissenters, too, treated the taxable event as storage or withdrawal. 49 Ill. 2d, at 57, 273 N. E. 2d, at 591.[5]

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[5] The Illinois court's interpretation of the temporary storage provision makes it clear that loading into the tanks of the airplane is a relevant event but is not the taxable event. The court indicated that the temporary storage exemption suspended the effect of otherwise-taxable events:

"To put it another way, the legislature has stated that the temporary storage and the withdrawal therefrom are not taxable uses, if the property in question is to be used solely outside the State. It is clear that if United was to withdraw its fuel from storage at Des Plaines and the airports and transport it outside the State for use elsewhere, as for example at an airport in nearby Wisconsin, the exemption would apply and neither the storage, nor the withdrawal, nor the transportation of the fuel outside the State would be uses subject to the tax." 49 Ill. 2d, at 55, 273 N. E. 2d, at 590.

Under this view all the fuel is "used" and subject to Illinois tax when it is temporarily stored or withdrawn from storage. The tax-

This Court usually has deferred to the interpretation placed on a state tax statute by the highest court of the State. *Scripto, Inc.* v. *Carson*, 362 U. S. 207, 210 (1960); *General Trading Co.* v. *State Tax Commission*, 322 U. S. 335, 337 (1944). See *Evco* v. *Jones*, 409 U. S. — (1972). As in *Edelman*, we see no reason to ignore, or to disagree with, the state court's determination that the taxable event is storage rather than consumption.

We hold that *Edelman* and *Nashville* support the conclusion of the Supreme Court of Illinois that this tax, as applied to all fuel withdrawn from storage for consumption in an interstate vehicle, does not place an unconstitutional burden on interstate commerce. Further, we decline to hold that *Edelman* has outlived its usefulness.* We must concede that for a long time this area of state tax law has been cloudy and complicated, primarily because the varied nature of interstate activities makes line drawing difficult. This Court has established some precedents, however, and *Edelman* and *Nashville* remain useful guidelines.

The line drawn between an impermissible tax on mere consumption of fuel, as in *Helson*, and a permissible tax on storage of fuel before loading, as in *Edelman* and *Nashville*, continues to serve rational purposes. Retain-

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able event is nullified, however, if the fuel is transported from the State for consumption elsewhere.

Although this use of a subsequent event to define the effect of a prior event may appear somewhat unusual, the result may be said to be compelled since fuel in transit may not be constitutionally taxed. See *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157 (1954). A similar exemption for gasoline "exported or sold for exportation from the State" was present in the Wyoming statute challenged in *Edelman*. 289 U. S., at 250.

* *Amici* have urged reconsideration of *Edelman*, arguing that it represents "a high-water mark in the Court's search in the early thirties for formulas that would assist states in finding additional sources of revenue." Brief of American Airlines et al. 13.

ing the line at this point minimizes the danger of double taxation and yet provides a source of revenue having a relation to the event taxed. Double taxation is minimized because the fuel cannot be taxed by States through which it is transported, under *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157 (1954), nor by the State in which it is merely consumed, under *Helson*. A fair result is achieved because a State in which preloading storage facilities are maintained is likely to provide substantial services to those facilities, including police protection and the maintenance of public access roads.[7]

Since no persuasive reason has been advanced for changing the established rule, we reaffirm *Edelman* and *Nashville* as precedents.

II

United contended in state court that the Illinois temporary storage exemption should be interpreted, as a matter of state law, to encompass the "burn off" rule which, as noted above, had received administrative sanction for eight years. 49 Ill. 2d, at 49, 273 N. E. 2d, at 587. Two justices of the Illinois court deemed themselves bound under *Helson* to regard the "burn off" rule as invalid under the Federal Constitution. 49 Ill. 2d, at 50, 273 N. E. 2d, at 587. This basis for construing a state statute creates a federal question. *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 120 (1924). The possibility that the state court might have reached the same conclusion if it had decided the question purely as a matter of state law does not create an adequate and

[7] Although this is a general state tax, rather than a toll on commerce, this Court has recognized that interstate commerce can be "required to pay a nondiscriminatory share of the tax burden." *Braniff Airways, Inc.* v. *Nebraska State Board of Equalization*, 347 U. S. 590, 598 (1954). In *Helson, in contrast*, the ferry boat was asked to bear more than its "nondiscriminatory share" when it was taxed only for passing through Kentucky waters.

independent state ground that relieves this Court of the necessity of considering the federal question. *Beecher v. Alabama*, 389 U. S. 35, 37 n. 3 (1967); see C. Wright, Federal Courts § 107, at 488 (2d ed. 1970). Since the other justices of the Illinois court divided three to two on the state law issue, the votes of the two who felt bound by *Helson* could be determinative of the state issue. Under these circumstances, we proceed to consider the validity of the "burn off" rule in the light of *Helson*, as United has urged us to do. See *Perkins v. Benguet Mining Co.*, 342 U. S. 437, 441–443.

The facts in *Helson* are different from the facts here. In *Helson* the operators of the interstate ferry boat purchased and took delivery of fuel in Illinois. The office, the place of business, and the situs of all the taxpayer's property were in Illinois. The boat crossed the Ohio River into Kentucky on regular runs, and Kentucky sought to impose a tax on the use of gasoline consumed in Kentucky. The Court invalidated the tax "computed and imposed upon the use of the gasoline thus consumed." 279 U. S., at 248.

In the present case Illinois is the State of storage of United's fuel before loading. If Illinois imposed a tax on the basis of that storage but measured the tax only by the fuel consumed over Illinois, a lower tax would result. The dangers of multiple taxation and possible tax windfalls, already suggested as justifying the *Helson* decision, would not be present if the tax were imposed on storage prior to loading but were measured by consumption. Multiple taxation and tax windfalls are avoided because only one State—the State of storage before loading—has a local event upon which a tax is imposed. Under *Helson*, States over which the planes fly will be unable to impose a tax on mere consumption.[8]

[8] Those justices of the Illinois court who relied on *Helson* did not consider, apparently, any interpretation of *Helson* that would pre-

The use of a method of tax measurement that is intimately related to interstate commerce is not automatically unconstitutional. Tolls on the use of facilities that aid interstate commerce have been upheld even when measured by passengers or by mileage traveled on the highways of a State. *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, 405 U. S. 707 (1972); *Interstate Buses Corp.* v. *Blodgett*, 276 U. S. 245 (1928). Upon the facts before us,* we see no constitutional barrier to the use of the "burn off" rule by Illinois to measure the tax imposed for storage before loading.

Since we now determine that the federal compulsion felt by two justices of the Illinois court is not warranted, we remand the case to avoid the risk of "an affirmance of a decision which might have been decided differently if the court below had felt free, under our decisions, to do so." *Perkins* v. *Benguet Mining Co.*, 342 U. S. 437, 443 (1952). We, of course, express no opinion on the construction of the temporary storage provision under state law.

The judgment of the Supreme Court of Illinois is vacated and the case is remanded to that court for further proceedings.

*It is so ordered.*

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vent multistate taxation. They suggested that an adoption of the "burn off" rule would allow taxation by every State over which United's planes fly. 49 Ill. 2d, at 51, 273 N. E. 2d, at 588.

* United successfully calculated and paid the state tax under the "burn off" interpretation for eight years. Appendix 41. No suggestion has been made that the recordkeeping procedures were an intolerable burden on commerce or that special equipment must be installed to measure fuel consumption.

# SUPREME COURT OF THE UNITED STATES

No. 71-862

United Air Lines, Inc., Appellant, v. George E. Mahin et al. | On Appeal from the Supreme Court of Illinois.

[March 5, 1973]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE STEWART and MR. JUSTICE WHITE concur, dissenting.

The Court today makes a break with the history of the Commerce Clause that has been largely responsible for creating in this Nation a great common market. One protective device this Court has used to keep the national channels of commerce open against hostile state legislation has been the constitutional ban on state taxation levied on interstate activities. In 1872, in *Case of State Freight Tax*, 15 Wall. 232, we held unconstitutional a state tax "so far as it applies to articles . . . taken up in the State and carried out of it . . . ." *Id.*, at 282. While there are ways in which interstate commerce can be required to pay its way, we have not until today abandoned the basic principle that a State may not tax interstate activities. That is what is done here, for the Illinois tax is levied on filling the fuel tanks of airplanes taking off for interstate or foreign journeys. If Illinois can tax that segment of the interstate activity, there is no reason why she may not tax the taking-off itself. The filling of fuel tanks to make an interstate or foreign journey is as indispensable a part and parcel of the interstate or foreign journey as using the runways for that purpose.

The Supreme Court of Illinois sustained the Illinois Use Tax [1] on all aviation fuel loaded aboard United's interstate and foreign flights departing from Chicago. United purchases fuel outside Illinois and stores it in Illinois temporarily for its interstate and foreign operations. The Use Tax exempts from the tax property purchased outside Illinois, temporarily stored in the State, and used solely outside the State.[2]

Until 1963 the temporary storage exception was construed by the Department of Revenue, so as to subject to the Use Tax only that fuel loaded on departing flights that was actually burned over Illinois. In 1963 the Department changed its prior ruling and announced:

> ". . . temporary storage ends and a taxable use occurs when the fuel is taken out of storage facilities and is placed into the tank of the airplane, railroad engine or truck. At this point, the fuel is converted into its ultimate use, and, therefore, a taxable use occurs in Illinois."

The Supreme Court of Illinois upheld that construction and application of the Use Tax against the claim that it violates the Commerce Clause, saying that United's storage becomes something more than temporary storage for safekeeping "prior to its use solely outside of Illinois." 49 Ill. 2d 45, —, 273 N. E. 2d 585, —.

The taxable event is the act of loading the fuel aboard United's aircraft in Illinois preparatory to their interstate or foreign journey. The majority states that the Supreme Court of Illinois concluded that either the storage of the gasoline itself or the withdrawal therefrom are uses which may be taxed without offending the Federal Constitution. But that statement of the Supreme Court of Illinois was made in its discussion of the exemption from

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[1] Ill. Rev. Stat., c. 120, § 439.1.

[2] *Id.*, § 439.3.

the use-tax, which, as relevant here, provides: "The temporary storage, in this state, of tangible personal property if acquired outside this state and which, subsequent to being brought into this state and stored here temporarily, is used solely outside the state." That means that the temporary storage exemption would extend not merely to storage on the ground but also to its loading aboard the transportation vehicles, such as trucks or railroad cars, and to its transportation from the State. It is thus obvious that unless the means of removing the property from the State is included in the scope of the temporary storage, it would be a nullity, as appellant maintains. Since in this case, there is no tax if fuel is withdrawn from storage and taken from the State by other means, it is clear that neither the storage nor the removal from storage is what makes the fuel taxable. The majority properly notes that, as a matter of state law and the Illinois court's interpretation thereof, it is the "consumption" wholly without the State that makes the exception operable. Conversely, I read the Illinois opinion to mean that, as a matter of state law, it is at least partial consumption within the State that brings the tax on *all* the fuel into play. That is so even if only a small portion of the fuel is consumed within the State, while the remainder is consumed out-of-state during an interstate or foreign flight. The inescapable conclusion from the state court's interpretation of this state law is that the act of loading the fuel into the fuel tanks of the interstate aircraft solely for use as the motive power is the taxable event.

If that event were used to tax fuel used on an *intrastate* flight, no problem under the Commerce Clause would arise. But loading is part of the interstate activity when planes prepare for an interstate journey, just as loading is a part of the shipment of goods by rail or water interstate (*Puget Sound Stevedoring Co.* v. *Tax Commis-*

*sion*, 302 U. S. 90, 92–94; *Joseph* v. *Carter & Weeks Stevedoring Co.*, 330 U. S. 422, 427, 433–434) and just as local pick-ups of parcels and local delivery of parcels in interstate movement are not permissible grounds "for a state license, privilege, or occupation tax." *Railway Express Agency* v. *Virginia*, 347 U. S. 359, 368.

In *Richfield Oil Corp.* v. *State Board*, 329 U. S. 69, we held invalid a state sales tax levied on the delivery of fuel oil into a ship for overseas carriage. We said "[t]he incident which gave rise to the accrual of the tax was a step in the export process." *Id.*, at 84. A like result was reached in *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157, where a State sought to impose a severance tax on the transfer of gas from a refinery pipeline to an interstate pipeline. We noted that the "taxable incidence" was the taking of gas from a local plant "for the purpose of immediate interstate transmission." *Id.*, at 161. We therefore held it unconstitutional, since it was a tax "on the exit of the gas from the State." *Id.*, at 167.

The present tax is analagous to the tax on the privilege of carrying on an exclusively interstate business which we struck down in *Spector Motor Service* v. *O'Connor*, 340 U. S. 602, 608. A tax upon an integral part of interstate commerce is a tax that no State by reason of the Commerce Clause is empowered to impose, unless authorized by Congress. *Id.*, at 608.

The fuel in United's planes propels the interstate flights; because it is the source of the motive power, it is essential to the interstate journey. It is, therefore, indisputably a part and parcel of the interstate movement. *McCarroll* v. *Dixie Greyhound Lines, Inc.*, 309 U. S. 176, involved an Arkansas statute which prohibited any truck or automobile from entering the State with more than 20 gallons of gasoline in its tank unless an excise tax were paid on the gasoline. The Court held

the tax unconstitutional because it imposed a tax on "gasoline to be immediately transported over the roads of Arkansas *for consumption beyond.*" *Id.*, at 180 (emphasis added). Similarly, Illinois imposes its tax on all of the fuel loaded into the airplane's tanks, whether or not that fuel is consumed out-of-state. In *Helson* v. *Kentucky*, 279 U. S. 245, on which the Illinois Supreme Court relied in disapproving the earlier construction of the statute, a ferry boat operated between Illinois and Kentucky, having its office in Illinois and buying all its fuel there. Kentucky sought to tax that portion of the fuel used in Kentucky. This Court invalidated the tax, saying it was "exacted as the price of the privilege of using an instrumentality of interstate commerce." *Id.*, at 252. If that tax is invalid, it follows *a fortiori* that Illinois may not tax the movement of airplanes from Illinois to California, from Illinois to Europe, or from Illinois to any other out of State point.

It is now well settled that interstate commerce can be required to pay its way, *Illinois Central R. Co.* v. *Minnesota*, 309 U. S. 157; *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250; *Greyhound Lines* v. *Mealey*, 334 U. S. 653; *Northwestern Cement Co.* v. *Minnesota*, 358 U. S. 450, a result commonly reached by formulae which allocate to the taxing state business derived from operations within the State. *Railway Express Agency* v. *Virginia*, 358 U. S. 434. Yet when pieces or segments of an interstate business are taxed, our cases reveal discrimination in approving or disapproving taxes that may be imposed. A State may not exact a license tax for the privilege of carrying on interstate commerce. *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, 56–58; *Murdock* v. *Pennsylvania*, 319 U. S. 105, 112–113. As stated in *Berwind-White* taxes "which are aimed at or discriminate against (interstate) commerce or impose a levy for the privilege of doing it, or tax interstate transportation and

communication or their gross earnings, or levy an exaction on merchandise in the course of its interstate journey" are within the ban, since they may "so readily be made the instrument of impeding and destroying interstate commerce." 309 U. S. 48.

Sales within the State, however, are taxable, though the goods have reached the market by interstate channels. *Magnano Co.* v. *Hamilton*, 292 U. S. 40, 43; *McGoldrick* v. *Berwind-White Co.*, *supra*, 58. The sales tax in *Berwind-White* was on the "transfer of title or possession or both," 309 U. S. 43. And we sustained the tax because of "a local activity" which we described as "delivery of goods within the state upon their purchase for consumption," *id.*, 58. As a consequence, an out-of-state buyer who purchases goods in New York City and takes them with him pays the tax, while if he has them shipped to him, he pays no sales tax.

Although "delivery of goods" within the State may be taxed, "solicitation" within the State for out-of-state confirmation and shipment into the State, may not be. *Nippert* v. *Richmond*, 327 U. S. 416, 422; *West Point Grocery Co.* v. *Opelika*, 354 U. S. 390. In *Dunbar-Stanley Studios, Inc.* v. *Alabama*, 393 U. S. 537, a tax was sustained on out-of-state photographers, since his activities were not soliciting orders for an out-of-state house but taking photographs within the State.

The use tax came into being to complement the sales tax, i. e., to fill in gaps where the States could not constitutionally tax interstate arrivals or departures. See *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 581. Thus goods may be taxed at the end of their interstate journey, where the tax does not discriminate against interstate commerce. *Henneford* v. *Silas Mason Co.*, *supra*, 582–583; *Felt & Tarrant Co.* v. *Gallagher*, 306 U. S. 62 (use tax on storage, use, or other consumption); *Southern*

*Pac. Co.* v. *Gallagher*, 306 U. S. 167 (storage and use). Use taxes imposed on storage or withdrawal from storage have consistently been sustained. *Eastern Air Transport* v. *Tax Commissioner*, 285 U. S. 147; *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472; *Nashville, Chattanooga & St. Louis Railway Co.* v. *Wallace*, 288 U. S. 249; *McGoldrick* v. *Berwind-White Co.*, *supra*, 49.

Nice distinctions are often necessary because, although all taxes on interstate carriers "in an ultimate sense, come out of interstate commerce" (*Freeman* v. *Hewitt*, 329 U. S. 249, 256), the constitutional ban relates only to "a direct imposition on that very freedom of commercial flow which for more than a hundred and fifty years has been the ward of the Commerce Clause." *Id.*, 256.

For Illinois to tax the storage of fuel within its borders is, of course, constitutionally permissible, even though in time the fuel may be used in interstate or foreign commerce. In *Edelman* v. *Boeing Air Transport Inc.*, 289 U. S. 249, 251, the use tax was "not levied upon the consumption of gasoline in furnishing motive power for respondent's interstate planes." The tax was "applied to the stored gasoline as it is withdrawn from the storage tanks at the airport and placed in the planes." *Ibid.* "It is *the time of withdrawal alone* that 'use' is measured for the purposes of the tax." *Id.*, at 252. (Italics added.) At that time the gasoline was not irrevocably committed to interstate commerce, for it might be diverted to planes on intrastate journeys.

By contrast the taxable event on which Illinois levies her tax is not storage for future use, or withdrawal from storage, but only loading in the tanks of planes preparing for interstate or foreign journeys. It is therefore inescapably a tax on the actual motive power for an interstate or foreign journey. Taxing the fuel loaded in a plane destined for an interstate or foreign journey is, in

other words, taxing the privilege of using a facility in commerce, because the motive power [3] represented by the fuel has become part and parcel of the facility. The decision today marks a break with our constitutional tradition, which, absent an Act of Congress, has led this Court consistently to hold that the free flow of interstate commerce is a ward of the Commerce Clause. Without that free flow of commerce we would not have the great common market we enjoy today.

I would reverse the judgment of the Supreme Court of Illinois.

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[3] *Edelman* was distinguished in *Southern Pac. Co.* v. *Gallagher*, *supra*, as involving a tax "upon events prior to the commerce," 176, the Court going on to say "The principle illustrated by the *Helson* case forbids a tax upon commerce or consumption in commerce." *Ibid.*

# SUPREME COURT OF THE UNITED STATES

No. 71-862

United Air Lines, Inc., Appellant, v. George E. Mahin et al. | On Appeal from the Supreme Court of Illinois.

[March 5, 1973]

MR. JUSTICE WHITE, dissenting.

The Illinois statute in question, Ill. Rev. Stat. c. 120, § 439.3 (1971), taxes the use of tangible personal property in Illinois, and "use" is defined as being the "exercise . . . of any right or power over tangible property incident to the ownership of that property . . . ." *Id.*, § 439.2. The Illinois Supreme Court held that as applied in this case the statute taxed either the storage or the withdrawal of aviation fuel. But the statute itself goes on to exempt from tax property temporarily stored in the State, withdrawn from storage, loaded on transportation facilities and transported for use solely outside the State. *Id.*, § 439.3 (d). For the tax to apply, the property must not only be stored and withdrawn, but must also be further used or consumed in the State. It is this actual use or consumption in the State after storage and withdrawal that triggers the tax. Thus it was enough here to invoke the tax that the fuel was temporarily stored, withdrawn, loaded on interstate aircraft and then partially used within the State. But *Helson* v. *Kentucky*, 279 U. S. 245 (1929), forbids taxing the use of gasoline consumed within the State on an interstate trip. And as for that portion of the fuel withdrawn from storage, loaded on an aircraft and consumed in another State, the exemption in the statute would seemingly

cover it; but if the exemption itself is not to apply, *Helson, a fortiori,* bars the tax. Moreover, under the Due Process Clause of the Fourteenth Amendment Illinois has no jurisdiction to tax the use of property occurring in another State. *Norfolk & W. R. Co.* v. *Missouri State Tax Comm'n,* 390 U. S. 317, 324–325 (1968), and cases there cited.

